Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Phillip D. Forner, F&B Development, L.L.C., and Allendale Heating Co., Inc, a Michigan corporation,
Petitioners,

v.

Allendale Charter Township,
a subdivision of the State of Michigan

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a zoning case. Petitioners sought and obtained from Allendale Charter Township [ACT] rezoning of 37.62 acres of land to a Planned Unit Development [PUD]. A referendum reversed the rezoning. Petitioners sought variances from ACT's Zoning Board of Appeals [ZBA], which granted a variance subject to nine conditions. Petitioners alleged an as-applied constitutional challenge to the continued agricultural zoning of 25.25 acres of their land, claimed inverse condemnation, and appealed the ZBA's decision.

1. During the ZBA's January 9, 1997 public hearing, petitioners' counsel presented support for and several citizens spoke in opposition to petitioners' proposal. During the February 3, 1997 public meeting, the zoning administrator presented a staff report that included information not presented during the public hearing. Petitioners were not allowed to cross-examine the zoning administrator, to test the accuracy of the report's information, or to present rebuttal evidence. The ZBA adopted the report as its decision. Were petitioners unconstitutionally denied procedural due process?

2. The ZBA's variance included, among other conditions, a 7.55-acre open space that must continue until one year after the adjacent turkey farm ceased operating as an intensive animal operation. Did the ZBA or the continued agricultural zoning result in a taking of some (7.55 acres) or all of petitioners' land without compensation?

Corporate Disclosure Statement

There is no parent or publicly held company owning ten percent or more of the stock of either F & B Development L.L.C. or Allendale Heating Co., Inc.

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OPINIONS BELOW

The Michigan Supreme Court order denying leave (79a) is reported at 463 Mich. 1008; 627 N.W.2d 596 (2001) and the order denying reconsideration (77a) is reported at 465 Mich 862; 632 N.W.2d 139 (2001). The Michigan Court of Appeals opinion (1a) is unpublished as are the trial court's opinions (33a, 45a) and the Allendale Charter Township's Zoning Board of Appeals' decision (48a).

JURISDICTIONAL STATEMENT

The Michigan Supreme Court order denying leave was entered on April 30, 2001. The Michigan Supreme Court order denying reconsideration was entered on July 30, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law

which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MICHIGAN STATUTORY PROVISIONS

The following statutes are reproduced in the appendix:

MCL 125.271 *et seq.*
MCL 125.273
MCL 125.286b
MCL 125.286c
MCL 125.286e
MCL 125.293
MCL 125.294
MCL 285.471 *et seq.*

ALLENDALE CHARTER TOWNSHIP ZONING ORDINANCE PROVISIONS

The following provisions of the Allendale Charter Township [ACT] Zoning Ordinance are reproduced in the appendix:

art. 3, § 3.09
art. 5, § 5.01
art. 5, § 5.02

art. 5, § 5.08
art. 12
art. 20
art. 28, § 28.06

STATEMENT OF THE CASE

On October 24, 1994, petitioners sought rezoning of the 37.62 acres of land they owned to a planned unit development [PUD] district that would include seventy lots for single-family homes. *See* 207a for a PUD map. Petitioners began dewatering the site, enlarging the pond, building roads, and installing utilities on December 16, 1994. The Allendale Charter Township [ACT] Planning Commission Board approved the PUD site plan on January 16, 1995. The ACT Board approved the PUD in an April 10, 1995 ordinance.

On or about May 9, 1995, a group of township residents, including adjacent turkey farmer, Harley Sietsema,[1] filed petitions requesting a referendum vote on the PUD rezoning. Voters rejected the rezoning in an August 8, 1995 referendum, and the land reverted to its previous zoning classifications. *See* 206a for a map showing the zoning classifications. Petitioner Phillip D. Forner testified at trial that the cost of infrastructure

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[1] Sietsema was one of the unsuccessful bidders when the agriculturally zoned land came up for auction. Shortly before he turned in the petitions seeking the referendum on the rezoning of petitioners' land, Sietsema offered not to turn in the petitions if petitioners would sell him the agriculturally zoned land for $3,500 per acre.

work performed before the referendum was $112, 032.

Petitioners filed a two-count complaint. The first count alleged an as-applied constitutional challenge to the continued agricultural zoning. The second count claimed inverse condemnation.

Petitioners sought variances from ACT's Zoning Board of Appeals [the ZBA] on December 26, 1996. The ZBA held a January 9, 1997 public hearing on petitioners' variance request. Petitioner's trial counsel presented evidence, and several residents, including turkey farmer Sietsema, asserted that the variances were unwarranted, would result in unspecified safety, traffic, and infrastructure problems, and that a forty-seven lot development would be unobjectionable. No one spoke for or presented any evidence on behalf of ACT during the January 9, 1997 public hearing.

The ZBA's notice of its February 3, 1997 public meeting stated that ACT staff would present findings of fact and make recommendations concerning petitioners' request. The agenda stated that "public comment will not be entertained" and that "those present [should refrain] from inserting themselves into the Board's discussion of this matter" (52a).

The ZBA chairperson convened the public meeting and restated the prohibition against public comment. During the meeting, ACT's zoning administrator reviewed each section of a twenty-page document entitled "Staff Report and Recommendations" [Staff Report] (54a). The Staff Report included information not presented during the January 9, 1997 public hearing, set forth forty findings of fact, and recommended granting a variance on the agriculturally zoned land that

comprised 25.25 acres of the 37.62 acres of land at issue.

The proposed variance contained nine conditions, including minimum lot sizes, minimum lot widths, a maximum of twenty-eight lots, a 7.55-acre open space that was to remain undeveloped until one year after turkey farmer Sietsema decided, in his sole discretion, to cease operating his turkey farm on land adjacent to petitioners' land, a 990-foot-long landscaped, earthen berm, and a waiver against connection to public sewer and water.

At the conclusion of the zoning administrator's presentation during the February 3, 1997 public meeting, the ZBA members voted to adopt the minutes and resolution that the zoning administrator had presented. Petitioner's trial counsel asked to make a statement to the ZBA concerning its action, but the chair denied the request, cited the agenda, and noted that a public hearing had already been held on this matter.

On February 12, 1997, petitioners moved for and were granted leave to amend their complaint to include a third count appealing the ZBA's decision. That same day, trial began on Counts I and II.

On June 27, 1997, the trial court found, as to Counts I and II, that petitioners had not proven that ACT's Zoning Ordinance was arbitrary and capricious as applied to their land and that there had been no taking of petitioners' land by inverse condemnation. Specifically, the court held that the land had "considerable value as farmland ($90,000) and $200,000 for rural residential" lots (39a), that there was a "clear and compelling governmental interest in preventing incompatible land uses" (41a (emphasis as in original)), that there was a

debatable question as to whether petitioners' proposed use should prevail over the existing zoning that took into consideration the adjacent turkey farm (42a), and that it was not an unconstitutional, arbitrary, or unreasonable restriction on petitioners' use of their property to reserve one quarter of the land for future development when the need for a buffer no longer existed (42a).

On May 14, 1998, the trial court, acting in its role as an appellate court, affirmed the ZBA's decision, holding that it did not offend the state constitution, that it complied with the Township Rural Zoning Act, MCL 125. 271 *et seq.*, and that there were no procedural flaws. Specifically, the court held that the ZBA's decision did not violate state law because the alleged flaws were conditions associated with the variance and because MCL 125.293 expressly permits granting a variance with conditions (46a), that petitioners were not denied procedural due process when they were denied the opportunities to cross-examine the zoning administrator and test the accuracy of the Staff Report because petitioners waived their opportunity to do so when they did not seek a rehearing (47a), that the ZBA's decision was based on competent, material, and substantial evidence (47a), and that the decision was a reasonable exercise of discretion (47a).

On June 5, 1998, the court entered a final judgment resolving each of the three counts against petitioners. Petitioners claimed an appeal of right to the Michigan Court of Appeals on Counts I and II, the as-applied constitutional challenge and the inverse condemnation claim. Petitioners also filed applications for leave to appeal from Count III (the ZBA appeal) to the Michigan

Court of Appeals. On November 9, 1998, the court consolidated those applications for leave to appeal on Count III and denied them for lack of merit in the grounds presented (83a).

Petitioners sought leave to appeal from the Michigan Supreme Court, which remanded the case to the Court of Appeals in a May 25, 1999 order as on leave granted and directed the court to consider Count III with petitioners' appeal on Counts I and II (81a).

After remand, the Michigan Court of Appeals issued a May 26, 2000 unpublished, *per curiam* opinion that affirmed the lower court's decision in ACT's favor. Among other things, the appellate court rejected petitioners' assertion that the referendum constituted a taking because it deprived them of their PUD zoning, halted all infrastructure construction work then in progress, and deprived them of their legitimate investment-backed expectations (15a). The court held that there was a legitimate governmental interest in separating intensive agricultural operations from single-family residences (15a), and that it was neither arbitrary nor capricious to reject the PUD on the basis that it allowed too many homes to be constructed too close to the turkey farm (16a).

In response to petitioners' assertion that ACT cannot impose the unconstitutional burden of a 7.55-acre open space on them to resolve any incompatible use that may exist, the appellate court held that petitioners violated the non-segmentation principle (17a), that petitioners were required to maintain the open space only if they accepted the variance, which they did not have to do (17a), that petitioners' agriculturally zoned

land had value for agricultural use or for rural residential use (17a), and that the ZBA imposed the open space requirement as a condition of the variance and not to abate an adjacent nuisance (18a). The court concluded that petitioners' taking claims failed because they did not establish that the zoning ordinance deprived them of all economically viable use of the land (18a).

Turning to the appeal of the ZBA's decision, the appellate court rejected petitioners' argument that they were denied procedural due process during the January 9, 1997 public hearing and the February 3, 1997 public meeting. The court concluded that petitioners were not denied due process when they had notice of the public hearing, presented evidence at that hearing, failed to object when the Staff Report was introduced during the public meeting, and did not put a statement in writing as they were invited to do after the ZBA denied petitioners' counsel's request to address the ZBA (23a-24a).

On June 16, 2000, petitioners sought leave to appeal from the Michigan Court of Appeals' decision in the Michigan Supreme Court, which denied leave in an April 30, 2001 order (79a). Petitioners sought reconsideration, which was denied in a July 30, 2001 order of the Michigan Supreme Court (77a).

ARGUMENT FOR GRANTING THE WRIT

I. The ZBA Denied Petitioners Procedural Due Process

The Fifth and Fourteenth Amendments to the Constitution protect the procedural due process rights of

citizens in each of the States. Various laws protect the due process rights of accused jaywalkers, purse snatchers, muggers, drug dealers, and murderers. Other laws protect the due process rights of teachers, fire fighters, police officers, and college faculty in their employment. Still other laws protect the licenses of doctors, lawyers, tavern owners, and motor vehicle drivers from being taken without due process of law. Yet, in some states, property owners have little to no assurance that they will receive due process rights like the right to cross-examine witnesses, the right to test the veracity of information provided to the ZBA, or the right to present rebuttal evidence or witnesses when they seek variances from local ZBAs to use their land.

These rights are crucial to property owners who must seek variances before proceeding with any inverse condemnation claim they may have. Under the rule from *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186-194 (1985), petitioners' claim must be ripe, which requires exhaustion of administrative remedies. In zoning cases, that means seeking variances from a ZBA. Any ZBA proceedings may become the basis of an inverse condemnation claim and comprise the record to which reviewing courts look in evaluating an inverse condemnation claim. If a property owner is not allowed to cross-examine a witness or to test the truth of information brought to the ZBA or permitted to present rebuttal evidence or witnesses, then the property owner cannot present the evidence needed to support that inverse condemnation claim.

This Court observed in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994):

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in . . . comparable circumstances.

And poor relations they are in many states.

Petitioners contend that they were denied procedural due process during the ZBA decision-making process. During the ZBA's January 9, 1997 public hearing, petitioners' counsel spoke in favor of petitioners' proposed seventy-lot, single-family, residential development. Several residents spoke in opposition to the proposed development (198a). No one associated with ACT addressed the ZBA (198a); nor did respondent or any citizen submit any documentary evidence to the ZBA before the close of the public hearing, although one citizen wrote a letter generally opposing the proposed development (204a).

The agenda for the February 3, 1997 public meeting (52a) included the following notice:

> The sole purpose of this meeting is to receive the staff recommendation, discussion and questions by the Board members, to approve, to approve with modification, to table for further information, or disapprove the variance request. Public comment will not be entertained. I will appreciate those present from inserting themselves into the Board's

discussion of this matter.

During the February 9, 1997 public meeting, the zoning administrator presented the Staff Report. It included information that had not been presented during the public hearing (64a). Petitioners' counsel tried to object, but that objection was not recorded in the ZBA's minutes. The minutes do reflect a second attempt by petitioners' counsel to make a statement (50a), but the ZBA's chairperson denied the request and suggested that counsel submit a statement in writing (50a). As a result, petitioners were not allowed to cross-examine the zoning administrator, to test the accuracy of any information contained in the Staff Report, or to offer any rebuttal evidence or witnesses.

83 Am Jur 2nd, Zoning and Planning, § 783, pp 659-660 (footnotes omitted) addresses the use of evidence received during a public hearing as follows:

> The requirement that a board of adjustment act only after public hearing assumes that it will act on the basis of the evidence adduced at such hearing. Thus, the board may only rely upon evidence introduced in the public hearing; it may not rely upon information gained through interviews with public officials, or upon examination of records outside the hearing room. Nor may the board rely upon reports received after the close of a public hearing. Reliance upon evidence not adduced at the hearing amounts to a denial

> of a hearing and renders the action of the board subject to annulment by a court.

Similarly, 3 Rathkopf, The Law of Zoning and Planning, § 37.07[1], p 37-109, explains:

> The basic rule, applicable to all, is that a hearing before the body must be fair in all respects and must not be a mere formal procedure intended to precede a predetermined result.
>
> The purpose of a variance hearing is to ascertain facts bearing upon the questions of hardship, practical difficulty, the extent to which any hardship claimed is unnecessary, and whether a variance can be granted with substantial justice, both to the applicant and to the owners of other property in the area. . . . The purpose of the public hearing is not to conduct a poll of the likes and dislikes of neighboring property owners.

The Rathkopf treatise further explains:

> Inasmuch as the applicant for a variance or other relief from the board of appeals is basing his application upon the ground that his property and the development thereof are affected by the restrictions of the ordinance, and the hearing is one

> which is mandated by the enabling act-or by the ordinance in the case of special permit uses-it would appear clear that to deny the applicant the right to cross-examine a witness presenting evidence against him for consideration by the board is a denial of due process.

3 Rathkopf, The Law of Zoning and Planning, § 37.05[5], pp 37-103 - 37-104.

At least eleven states permit cross-examination during hearings held by ZBAs.[2] Oregon, in addition to

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[2] *See, Kelly Supply Company, Inc. v. City of Anchorage,* 516 P.2d 1206, 1209 (Alaska, 1973) (quoting approvingly from 2 E. Yokley, Zoning Law and Practice, 1972 Cum. Supp. at 36 (3d ed. 1965) that right of cross-examination exists in hearings on zoning matters); *Parsons v. Board of Zoning Appeals,* 140 Conn. 290, 292-293; 99 A.2d 149 (1953), *overruled* on other grounds in *Ward v. Zoning Board of Appeals,* 152 Conn. 141, 145-146; 215 A.2d 104 (1965) (authorizing cross-examination in a zoning variance case); *Korean Buddhist Dae Won Sa Temple v. Sullivan,* 87 Haw. 217, 243-245; 953 P.2d 1315 (1998) (approving of cross-examination in zoning cases); *E & E Hauling, Inc. v. County of DuPage,* 77 Ill. App.3d 1017, 1021-1022; 33 Ill. Dec. 536; 396 N.E.2d 1260 (1979) (requiring cross-examination when a hearing is held on a rezoning request); *Somerset v. Montgomery County Board of Appeals,* 245 Md. 52, 65-67; 225 A.2d 294 (1966) (reversing judgment in a zoning case when cross-examination was not allowed); *Jarrell v. Board of Adjustment,* 258 N.C. 476, 481; 128 S.E.2d 879 (1963) (authorizing cross-examination in a case involving a non-conforming use); *State ex rel. Battershell v. Albuquerque,* 108 N.M. 658, 662; 777 P.2d 386 (1989) (reversing denial of conditional use permit when cross-examination not permitted); *Clinckscales v. City of Lake Oswego,* 47 Or. App. 1117; 615 P2d 1164, 1168, *lv. den.* 289 Or 741 (1980) (allowing cross examination where

allowing cross-examination when the ordinance permits it, also affords a petitioner the right to be heard, the right to present evidence, and the right to rebut evidence. *Fasano v. Washington County Board of Commissioners*, 264 Or. 574, 588; 507 P.2d 23 (1973) *overruled* on other grounds, *Neuberger v. City of Portland*, 288 Or. 585, 589; 607 P.2d 722 (1980). At least one state and two federal circuit courts of appeals, however, do not permit cross-examination during administrative hearings in land use cases.[3]

Minnesota has a general rule that does not permit cross-examination during administrative hearings in land use cases, *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn., 1978) (involving special use permit), but recognizes that, under certain circumstances, due

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ordinance permits it); *Plymouth v. County of Montgomery*, 121 Pa. Cmwlth. 303, 314-315; 550 A.2d 1033 (1988) (affirming trial court's conclusion that township wrongfully denied the county the right to cross-examine the township engineer); *Westminster Corp. v. Zoning Board of Review*, 103 R. I. 381; 238 A.2d 353, 360-361; 27 ALR3d 1285 (1968) (authorizing cross-examination in appropriate zoning cases); *Board of Adjustment v. Willie*, 511 S.W.2d 591, 594 (Tex. Civ. App. 1974) (noting that the right to cross-examination should be afforded to parties in zoning cases).

[3] *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 41-41 (C.A. 1, 1987) (involving revocation of building permit); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 724 (C.A. 10, 1989) *abrogated* in part on other grounds in *Federal Lands Legal Consortium v. United States*; 195 F3d 1190 (C.A. 10, 1999) (involving denial of building permit); *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 299-301; 58 Cal. Rptr.2d 721 (1996) (involving nuisance abatement proceeding).

process may not be satisfied without cross-examination. *Kletchka v. LeSeur County Board of Commissioners*, 277 N.W.2d 404, 405 n 1 (Minn. 1979).

The District of Columbia appears to have a mixed policy. In *Donnelly Associates v. District of Columbia Historic Preservation Review Board*, 520 A.2d 270, 284-285 (D.C., 1987), the District of Columbia Court of Appeals held that cross-examination was not constitutionally required in a public hearing on historic landmark designation. Similarly, that same court held in *Chevy Chase Citizens Association v. District of Columbia Council*, 327 A.2d 310, 317 (D.C., 1974), that cross-examination was not required during a hearing on whether to close a street. In *Glenbrook Road Association v. District of Columbia Board of Zoning Adjustment*, 605 A.2d 22, 38 (D. C., 1992), however, the court noted that the zoning case was a contested case, which it described as a "trial-type hearing" with the right to cross-examination expressly authorized by the ordinance.

Michigan has no statute expressly guaranteeing a land owner the right to cross-examine witnesses in zoning cases. No Michigan case provides a right to cross-examine witnesses in zoning cases, although a few cases refer to cross-examinations during ZBA hearings.[4] The

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[4] *See, e.g. Kropf v. City of Sterling Heights*, 391 Mich. 139, 169-170; 215 N.W.2d 179 (1974) (concurring opinion by Levin, J.) (quoting approvingly from authorities on the right to be heard, to present evidence, and to rebut evidence); *Walker's Amusements, Inc. v. Lathrop Village*, 100 Mich. App. 36, 39-41; 298 N.W.2d 878 (1980) (discussing hearing officer's taking of testimony and receipt of evidence); *Dettore v. Brighton Township*, 91 Mich App 526, 537; 284 N.W. 2d 148 (1979) *vacated* on other grounds, 408 Mich 957 (1980)

Michigan Supreme Court has reversed cases on due process grounds involving other administrative agencies when the litigants were not allowed to cross-examine witnesses.[5]

The trial court, sitting in this case as an appellate court, held that petitioners waived their right to cross-examine the zoning administrator when petitioners did not seek a rehearing (47a). Waiver is defined as a knowing and voluntary relinquishment of a known right. Barron's Law Dictionary, 3d ed., p 524.[6] Nothing in Michigan's Township Zoning Act, MCL 125.271 *et. seq.*, or ACT's Zoning Ordinance grants petitioners the right to cross-examine a witness. Furthermore, petitioners had no right to reconsideration or a rehearing under the Zoning Ordinance.[7] Petitioners, therefore, had no right to rehearing or reconsideration and could not have

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(noting that the plaintiff's counsel questioned unsworn witnesses).

[5] *See, e.g., Pavilion Apartments Inc. v. Michigan Tax Commission*, 373 Mich 601, 606-610; 130 N.W.2d 399 (1964) (holding that due process violated in tax case when report withheld and litigant not allowed to cross examine report's author); *L. A. Darling Co. v. Michigan Water Resources Commission*, 341 Mich 654, 657-658, 664-668; 67 N.W.2d 890 (1955) (noting that witnesses were not sworn, examined, or cross-examined and reversing on the ground that the hearing's shortcomings violated the litigant's due process right).

[6] *See also, Moore v. First Security Casualty Co.*, 224 Mich. App. 370, 376; 568 N.W.2d 841 (1997) (defining waiver).

[7] The Zoning Ordinance, art 28, §28.06, permits its ZBA to reconsider its decision upon submission of "substantial new evidence that was not available at the time of the hearing" (187a).

waived a right they did not have.

The Michigan Court of Appeals held that "the record does not support plaintiffs' argument that they were not given opportunity to challenge the staff report's content" (24a). The record **does** reflect that the ZBA printed a notice on its agenda (53a) and stated at the beginning of the public meeting that attendees would not be permitted to speak (48a). The record also shows that petitioners' counsel asked, but was not permitted, to speak (50a). It is very difficult, if not impossible, to have the record, which is kept by respondent, reflect a request to challenge the Staff Report when petitioners' counsel was denied the opportunity to speak.

Not only did the ZBA refuse to allow petitioners' counsel to speak, it also precluded the presentation of any rebuttal evidence. As a result, the appellate courts affirmed, based upon the ZBA's findings of fact, which, in turn, were based on the Staff Report that petitioners were not permitted to challenge.

The right to present rebuttal evidence is a key due process right in zoning cases. 3 Rathkopf, The Law of Zoning and Planning, § 37.07[3][a], pp 37-112 - 37-113 (footnotes omitted) explains:

> A situation which presents the element of unfairness is for the views of one party to a proceeding before the board to be presented to the board under circumstances which deprive the opposing party of the opportunity to know what was presented and the further opportunity to respond to it.

Several courts in seven states have made similar observations.[8] For example, in *Fobe Associates v. Board of*

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[8] *See, Pizzola v. Planning and Zoning Commission of the Town of Plainville*, 167 Conn. 202, 206-208; 355 A.2d 21 (1974) (holding that board may obtain technical and professional assistance, but may not use *ex parte* information supplied by a party without affording the opposing party an opportunity to know of the information and to offer evidence in explanation or rebuttal); *Kyser v. Zoning Board of Appeals*, 155 Conn. 236, 249-251; 230 A.2d 595 (1967) (agreeing that board may obtain professional assistance and finding no due process violation when building inspector and sanitarian were called into executive session for two and one-half minutes to explain a discrepancy in building dimensions and when neither made any attempt to influence the board in its decision); *Yurdin v. Town Plan and Zoning Commission*, 145 Conn. 416, 420-421; 143 A.2d 639 (1958) (finding no impropriety when planning director and planning technician called into executive session to explain previously prepared reports and when neither made any attempt to influence the board in its decision); *Hazelton v. Zoning Board of Appeals*, 48 Ill. App.3d 348, 352; 363 N.E.2d 44 (1977) (reversing denial of building permit when the board relied upon, but did not put evidence from prior variance hearing into the record of this hearing and afford plaintiffs an opportunity to counter it); *Mutton Hill Estates, Inc. v. Town of Oakland*, 468 A.2d 989, 992 (Me., 1983) (affirming on procedural due process grounds lower court's reversal of board's denial of subdivision when board invited opponents to participate in *ex parte* fact finding compilation without notice to proponents and without providing proponents an opportunity to be heard); *State ex rel. Steak n Shake, Inc. v. City of Richmond Heights*, 560 S.W.2d 373, 378 (Mo. App. 1977) (reversing denial of conditional use permits on the ground that city counsel lacked competent evidence to support its decision when it relied upon a report dated after the public hearing that was not in the record and without reopening the hearing to afford appellant an opportunity to reply to the report); *Stein v. Board of Appeals of the Town of Islip*, 100 A.D.2d 590; 473 N.Y.S.2d 535, 536 (1984) (holding that board violated petitioner's procedural due

Adjustment, 74 N.J. 519, 542; 379 A.2d 31 (1977) *overruled* in part on other grounds, *Southern Burlington County N.A.A.C.P. v. Mt. Laurel*, 92 N.J. 158; 456 A.2d 390 (1983), the New Jersey Supreme Court noted:

> It is commonplace for boards of adjustment and courts to give consideration to reports of planning agencies such as master and regional planners as background material in zoning and planning cases. So long as reasonable notice of the submission of such materials is afforded an opponent, with an opportunity to meet any adverse impact therefrom, there can be no fair complaint

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process rights when it relied on a letter received after public hearing and without allowing petitioner to rebut the letter's allegations); *Humble Oil & Refining Co. v. Board of Aldermen*, 286 N.C. 170, 173-174; 209 S.E.2d 447 (1974) (reversing denial of special use permit when board relied upon a letter, report and knowledge of individual board members, none of which was disclosed to petitioner and to which petitioner had no opportunity to refute); *Niggel v. City of Columbia*, 254 S.C. 19, 25-26; 173 S.E.2d 136 (1970) (noting that knowledge of board members may be used as a basis for board's decision if disclosed in the record so that the parties may test the accuracy or relevance of the information and to provide a record for review by the court).

See also 53 Pennsylvania Statutes § 10908(8) (2001) (prohibiting zoning board or hearing officer from direct or indirect communication on any issue, from taking notice of any report or staff memoranda or other materials, and from inspecting site unless all parties are afforded an opportunity to participate, contest, or be present).

concerning the use of such aids to informed adjudication.

The right to cross-examine a witness or the author of a report, the right to test the accuracy of information, and the right to present rebuttal evidence are critical procedural due process ingredients. Those rights were not afforded to petitioners in this case. The ZBA's decision in this case cannot be left to stand, much less be said to have been supported by competent, material, and substantial evidence. This Court should grant certiorari to consider the minimal procedural due process standards that boards, like the ZBA in this case, must provide to land owners, like petitioners in this case. Only when this Court determines the minimal standards necessary to guarantee due process will property owners cease to be the poor relations referred to in *Dolan*.

II. The Takings Claims

A. The 7.55-Acre Open Space is an Exaction.

The ZBA effected a taking of 7.55 acres of petitioners' land when it conditioned the variance it granted on the mandatory set aside of that land as open space. Petitioners acknowledge that MCL 125.293 (110a) authorizes a ZBA to impose conditions on variances granted, but another statute also requires that any conditions imposed must, among other things, be a valid exercise of the police power. (102a)

Petitioners assert that the imposition of the 7.55-acre open space is an invalid exercise of the police power.

It is an appropriation of petitioners' land for use as nuisance abatement space and is designed to separate petitioners' proposed residential development from the noise, odor, and dust generated by the adjacent turkey farm (68a). [9]

Noise, odor and dust are nuisances that must be abated under the MCL 125.294 (111a) and under the Zoning Ordinance, art 3, § 3.09 (127a). Whether characterized as a private use or a public use, requiring petitioners to provide a 7.55-acre open space to abate the nuisances generated by the turkey farm is an unconstitutional burden being thrust upon petitioners when their land is not the land from which the noise, dust, and odors emanate (102a).

Moreover, the 7.55-acre open space is an exaction of indefinite duration made without any showing that it is roughly proportional in nature and extent to the impact of the forty-six-lot, residential development that the ZBA approved. The 7.55-acre open space is an exaction because it is not an open space resulting from negotiations between a developer and a township for rezoning as a PUD or a special land use plan. MCL 125.286b (94a); MCL 125.286c (97a); MCL 125.286e (103a); Zoning Ordinance, art. 12 (142a); art. 20 (154a). The ZBA unilaterally imposed the open space as a condition of the variance (57a). Such action is contrary to *Dolan*, 512 U.S.

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[9] The turkey farm is a non-conforming use under the Zoning Ordinance because it does not satisfy the setback requirements of the Zoning Ordinance, art 5, § 5.08 (137a). In addition, the turkey farm is protected from nuisance claims by the Right to Farm Act, MCL 286.471 *et seq.* (112a).

at, 394-395 (holding that there was no reasonable relationship shown between either the flood plain easement and petitioner's proposed new building or the bicycle path dedication and any offset in traffic generated by petitioner's store).

The open space requirement leaves petitioners with no economically beneficial or productive uses for the 7.55 acres for as long as the turkey farm remains in existence, which is also contrary to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). Although the variance purports to permit petitioners to use the open space for any permitted use in the agricultural zone (133a) other than homes and roads, none of those uses are, as a practical matter, feasible.

For example, farming is a permitted use in the agricultural zone. Zoning Ordinance, art 5, § 5.02 (134a). The trial court cited children playing or leaving toys in the corn rows through which the turkey farmer moved his heavy equipment as an example of the incompatibility between the turkey farm and petitioners' residential development (38a). A fence is typically the means of keeping others out of areas, like the turkey farm. In any event, if petitioners farmed the 7.55 acre open space, would they not be exposing the children to the same hazzard as the trial court cited?

Livestock raising is another permitted use, but one that is subject to additional regulations, including a 1,300 foot setback from any existing residential plat. Zoning Ordinance, art 5, §§ 5.02, 5.08 (134a, 137a). The 7.55-acre open space is not large enough to satisfy the 1,300 foot setback (58a), which precludes petitioners from using the 7.55 acres for livestock raising. The trial court cited

repeated complaints about odor, dust, and noise as problems for the turkey farmer (38a). If petitioners were somehow able to use the 7.55 acres for livestock raising, would petitioners not be subject to the same odor, dust, and noise complaints as had been made against the turkey farmer?

Other permitted uses in the agricultural zone include a conservation area, a park or recreation area owned by a governmental agency, or an adult foster care small group home. Zoning Ordinance, art 5, § 5.02 (134a). There is no information in the Staff Report supporting the use of the 7.55-acre open space as a conservation area for flora. There are no trees on the 7.55 acres, except for the spruces petitioners planted on the earthen berm, which would preclude its use as a forest preserve. If ACT wants the 7.55 acres used as a conservation area, a park or recreation area, then it must buy it. Presumably, an adult foster care small group home is expressly excluded as a possible use under the variance, given the prohibition against construction of a dwelling on the 7.55-acre open space (57a).

This demonstrates that petitioners can do no more than plant grass on the open space ground, keep the grass mowed, and pay property taxes on that land at residential, not the lower agricultural, rates. If ACT wants the 7.55 acres to remain open and serve as a conservation area, a park, or recreation land, then ACT must pay for the land. Even ACT's own expert testified at trial that purchasing land was the only way he knew to acquire land for use as open space or a buffer.

The open space requirement deprived petitioners of the right to use that land for residential use. Under

Lucas, 505 US at 1027, a use cannot be prohibited when, as here, the prohibited use is an expressly permitted use and is not a nuisance. Residential use is not a nuisance. Furthermore, residential use has been a permitted use since petitioners purchased the land with the intention of developing it for single-family homes.

The Michigan Court of Appeals rejected petitioners' arguments, holding that petitioners violated the non-segmentation principle (17a). The non-segmentation principle precludes a land owner from dividing the property into discrete segments for the purpose of determining whether the rights in a particular segment have been entirely abrogated. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-131 (1978).[10]

This Court has not applied the non-segmentation principle to defeat a land owner's taking claim when it is the state that has imposed an exaction that segments the property. *Dolan*, 512 U.S. at 394-395; *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Nor should it begin to do so now. This Court should grant certiorari to decide whether the non-segmentation principle applies in *Dolan*-type exaction cases and to determine whether ACT has taken petitioners' 7.55 acres when there is no economically beneficial use for the parcel.

B. The Continued Agricultural Zoning of 25.25 acres of Petitioners' Land Effects a Taking

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[10] *See also, Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497-501 (1987) (explaining and applying the non-segmentation principle).

Petitioners contend that the continued agricultural zoning of 25.25 acres of their land effected a taking of that land without compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution.

Land use regulation can effectuate a taking requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-415 (1922). This Court has explained that these regulatory takings are subdivided into two categories: (1) a categorical taking arising from a physical invasion as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982) or where a regulation forces the land owner to sacrifice all economically beneficial uses of the land in the name of the common good as explained in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and *Lucas*, 505 U.S. at 1017 (explaining justification for the rule) and (2) a taking based upon application of the balancing test set forth in *Penn Central*, 438 U.S. at 125.

Petitioners do not contend that they sustained a physical invasion of their agriculturally zoned land. They do, however, contend that the continued agricultural zoning of that land furthers no legitimate governmental interest and deprives them of all economically beneficial use of that land.

Unrebutted trial testimony showed that public water and sewer are available to petitioners' land (66a). The Zoning Ordinance, art. 23, § 23.14(G) mandates connection to them if they are available (164a). The Zoning Ordinance, art. 5, § 5.01 provides that land should be rezoned to permit development at higher density when public utilities become available to it (133a).

ACT invested in a sanitary sewer lift station that

benefits, among others, petitioners' land. ACT approved rezoning of petitioners' land to a PUD that would permit development as a seventy-lot, single-family residential site condominium (55a). The August 1995 referendum reversed the PUD rezoning. The 1996 ACT Master Plan, which was adopted **after** the referendum, designated petitioners' agriculturally zoned land as land that should be rezoned to permit residential use at a higher density (66a).

These facts show that ACT established policies and took action before and after the referendum to encourage single-family residential development on petitioners' land at a density greater than that permitted in the agricultural zone. These facts also show that continued agricultural zoning of 25.25 acres of petitioners' land is arbitrary and capricious.

The turkey farmer was one of the unsuccessful bidders when the agricultural land came up for auction (34a). The turkey farmer and several other residents organized the petition for the referendum (36a). Just before the petitions were turned in, the turkey farmer offered not to turn in the petitions if petitioners would sell him the agricultural land for $3500 an acre.

The turkey farmer testified at trial about his belief that petitioners' proposed residential development would be incompatible with his turkey farm. He testified about the strict, bio-security system he used to protect his turkeys. His bio-security system was so strict that he testified he did not have a fence around his turkey farm and did not replace locks on the turkey barns when they wore out.

At about the same time that ACT adopted the 1996

Master Plan, which envisions rezoning petitioners' land to permit development at higher density, ACT began arguing that an incompatibility existed between the adjacent turkey farm and petitioners' proposed single-family residential development.

MCL 125.273 requires townships like ACT to group compatible uses together in zones (86a). Intensive agricultural operations, like the adjacent turkey farm, and single-family residences on one-acre lots are both permitted uses in the agricultural zone. Zoning Ordinance, art 5, § 5.02 (134a). As a result, there is no incompatibility between intensive agricultural operations like the turkey farm and single-family residential use.

Incompatibility arises when density reaches two single-family residences per acre (141a) and intensive agricultural operations are no longer a permitted use (139a). Petitioners' proposed development has a density of 1.86 single-family residences per acre [70 lots ÷ 37.62 acres = 1.86 lots per acre], which is below the two lots per acre bench mark at which incompatibility arises. Petitioners assert that ACT has no legitimate governmental interest in separating incompatible land uses when no incompatibility exists. Therefore, no legitimate governmental interest supports continued agricultural zoning on 25.25 acres of petitioners' land.

In addition to their claim that no legitimate governmental interest supported continued agricultural zoning of their 25.25 acres, petitioners assert that continued agricultural zoning deprives them of any economically beneficial use of that land. The trial court (39a) and the Michigan Court of Appeals (18a) each held that petitioners' agriculturally zoned land had $200,000

in value as a large rural residential estate. Neither court, however, considered the sums that petitioners were required to invest in their proposed residential development before the referendum.

Petitioners paid $108,000 for the agriculturally zoned land[11] and invested $112,032 in infrastructure work and legal fees to create the site condominium. Those two sums equal $220,032, which is more than the $200,000 value for the land as a large rural residential estate. Petitioners would lose $20,032 if they sold under those circumstances.[12]

Unrebutted trial testimony showed that petitioners lose money on a thirty-three lot development, that they break even on a forty-six lot development, and that they make money on a seventy lot development. Trial testimony from a soils expert showed that the land was suitable for growing small grains, container ornamentals, grasses, and sod, but that expert offered no opinion about the economics of that type of farming on petitioners' agriculturally zoned land. The only other testimony about the economics of farming the land came during

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[11] Petitioners paid $128,000 for 27.25 acres in 1989 (33a). Petitioners donated two acres of that land valued at $20,000 to a local charity (34a). The net price for the 25.25 acres of agriculturally zoned land was $108,000.

[12] Even if petitioners used the $95,434.46 in costs that they incurred as a direct result of the referendum (34a) instead of the $112,032 in costs noted above, the land acquisition cost and referendum related costs equal $203,434.46, which is still more than the $200,000 value of the land as a rural residential estate. Petitioners would lose $3,434.46 if they sold under those circumstances.

rebuttal from the farmer who leased petitioners' agriculturally zoned land, which revealed decreasing returns on the asparagus growing operation. All asparagus production ceased in 1996.

The record completely lacks evidence showing that petitioners have an economically beneficial use of the land as zoned. The reason for this lack of evidence is quite simple - the land is Class 3 soil, which is low in fertility, and is best suited for low density, single-family residential use, which requires a zoning change that ACT will not grant.

Petitioners have been led down a primrose path to what turned out not to be the promised land, but to the land of endless litigation. Petitioners cannot profitably develop their land into a forty-six-lot single-family residential development. The land lies idle and will remain idle until it can be economically and beneficially used.

Fundamental fairness demands that ACT not be permitted to adopt policies and take actions to encourage development on the land at the same time it seeks to limit development on that same land. Nor can ACT be permitted to claim incompatibility between two expressly permitted used in the agricultural zone when the density of petitioners' proposed development falls below the two lots per acre benchmark at which incompatibility arises under the Zoning Ordinance.

Petitioners have no economically beneficial use of the 25.25 acres of agriculturally zoned land. If they sell it, they lose money when their improvement costs are taken into consideration. If they develop it with forty-six or fewer lots, then they break even or lose money.

Petitioners respectfully request that this Court vacate, reverse, and remand this case to the Michigan Court of Appeals for entry of an order finding no legitimate governmental interest supporting continued agricultural zoning of petitioners' 25.25 acres of land and finding that petitioners have no economically beneficial use of that land.

CONCLUSION

Petitioners respectfully requests that this Court grant certiorari and reverse the Michigan Court of Appeals, holding that petitioners were denied procedural due process, that the non-segmentation principle does not vitiate petitioners' taking claim on the 7.55-acre open space, and that petitioners stated a claim for the taking of their agriculturally zoned land.

Respectfully submitted,

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STATE OF MICHIGAN
COURT OF APPEALS

PHILLIP D. FORNER, F& B DEVELOPMENT,L.L.C., and ALLENDALE HEATING CO. INC.,a Michigan Corporation, Plaintiffs-Appellants,	UNPUBLISHED May 26, 2000
v	No. 212531
ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan, Defendant-Appellee.	Ottawa Circuit Court LC No. 95-23665 CZ

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C., and ALLENDALE HEATING CO., INC., a Michigan corporation, Plaintiffs-Appellants,	
v	Nos. 219743, 219744
ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan, Defendant-Appellee.	Ottawa Circuit Court LC No. 95-23665 CZ

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs challenge as unconstitutional the zoning of part of their property as agricultural, and allege that defendant effected regulatory takings without just compensation, and that the determination by defendant's zoning board of appeals to grant them variances subject to certain conditions was unsupported by competent, material and substantial evidence, deprived them of procedural due process, and constituted an unreasonable exercise of discretion. We affirm.

I

Plaintiffs collectively own approximately 38 acres of contiguous property in defendant Allendale Charter Township (ACT), located in three separately zoned districts established under the township zoning ordinance (agricultural, residential and commercial). The property is near the intersection of M-45 and 60th Avenue in Ottawa County.

In May 1989, plaintiff Phillip D. Forner paid $128,000 to acquire the first parcel, approximately twenty-eight acres zoned agricultural (AG, on which a farm operated (Knoper farm). To date, asparagus is still grown and harvested on that land by a producer who pays Forner annual compensation. Allendale Heating, a commercial entity of which Forner is president, owns a contiguous 2.62-acre parcel that is zoned commercial (C-3). In 1992, Forner donated a parcel of the farm land to a non-profit organization. The remainder of the farm is approximately twenty-five acres. A quarter section line runs along the south border of Forner's farm property.

In 1994, plaintiff F & B Development, of which Forner is a principal, purchased a parcel of R-1 zoned property (low density, one-family residential district) south of the quarter section line, which was an existing subdivision project.

The property east of plaintiffs' farm property is also zoned AG, and is the site of a turkey farm, owned by Harley Sietsema. Defendant's zoning ordinance regarding AG-zoned property allows dwellings on lot areas of an acre or more, having lot widths at the front building line of 150 feet. All the property surrounding Forner's farm on the north, east, and west sides, north of the quarter line, is zoned AG.

South of plaintiffs' land are two residential developments, a seventy-six lot development (Dewpointe) and fifty-five lot development (Parkside). Both Developments are served by public water and sewer.

In October 1994, plaintiffs filed an application to rezone their combined 38-acre property into a seventy-lot, single family, residential planned unity development (PUD), to be known as Brookland Estates. In January 1995, defendant's Planning Commission approved plaintiffs' request for rezoning. The zoning Board of Appeals (ZBA) adopted an ordinance on April 10, 1995 approving the PUD site plan and amending the zoning ordinance to rezone the land as a PUD. The PUD imposed two conditions relating to the adjacent agricultural property housing the turkey farm - - the construction of a fifty-foot-wide berm on the east side of the subdivision, and the notification of purchasers of the subdivision lots that the lots are adjacent to an intensive

agricultural operation.

In May 1995, Sietsema and other property owners successfully petitioned for referendum on the PUD zoning ordinance amendment, and in August 1995 the rezoning was defeated by a large margin in a special election. The land thus reverted to its pre-amendment zoning classifications.

In September 1995, plaintiffs filed a two-count complaint in circuit court challenging the constitutionality of the zoning classification and claiming a taking of property without just compensation.

In December 1996, plaintiffs filed an application with the ZBA for variances from the area, frontage and density requirements in the AG zoned district (25.25 acres). Plaintiffs sought to reduce the minimum lot area from one acre to 10,000 square feet (corner lots to 12, 500 square feet); reduce the frontage lot width from 150 to eighty feet (corner lots to one hundred feet); and increase the maximum number of dwellings from twenty to twenty-eight. If these variances were granted, the twenty eight lots on the AG property and the lots on the R-1 property would total seventy lots.

The ZBA held a public hearing in January 1997 and, after a public meeting the next month, granted plaintiffs' variance application in part, with the following conditions: 1) maintenance of defined open space on the property's east side to separate the residential development from the intensive agricultural turkey farm operation; 2) construction and maintenance of an earthen berm, also to separate the two; 3) inclusion of a disclosure statement in the deeds conveying lots regarding the adjacent turkey farm operation; and 4) these conditions

would be eliminated when the farming operation east of plaintiffs' property ceased to be used as a confined animal feeding operation or for intensive animal raising for a period of one year.

In February 1997, the trial court granted plaintiffs leave to amend their complaint to add a third count, an appeal of the ZBA's decision granting the variances in part and with conditions, alleging that the decision was contrary to the Township Zoning Act (TZA), MCL 125.271 *et seq.*; MSA 5.2963 (1) *et seq.*, imposed an illegal and unconstitutional regulatory taking of plaintiffs' land, and that the ZBA had lacked subject-matter jurisdiction to hear plaintiffs' appeal. Plaintiffs further alleged that they were denied procedural due process, that the ZBA's decision was unsupported by competent, material and substantial evidence, and was not a reasonable exercise of its discretion under the TZA or defendant's zoning ordinance.

A bench trial on counts I and II began in February 1997. The trial court in defendant's favor in an opinion entered on June 27, 1997, rejecting plaintiffs' constitutional challenge to the original AG zoning classification and rejection plaintiffs' taking claim. The trial court's opinion stated that it would address count III in a separate opinion. After issuing an opinion and order on count III in January 1998, the trial court held the opinion in abeyance pending additional briefing and rehearing. On May 14, 1998, the court issued an opinion and order on count III affirming the ZBA's decision. Plaintiffs filed their first application for leave to appeal on count III on June 4, 1998, seeking review of the trial court's May 14, 1998 affirmance of the ZBA's decision.

The trial court entered a final judgment disposing of all counts on June 5, 1998. Plaintiffs filed a second application for leave to appeal with this Court on June 19, 1998, seeking review of the trial court's final judgment. On that day plaintiffs also filed an appeal of right from the June 5, 1998 judgment on counts I and II. This Court consolidated the two applications for leave to appeal on count III and denied both applications for absence of merit. Plaintiffs appealed to the Supreme Court which, in lieu of granting leave to appeal, remanded the appeals on count III to this Court for consideration with plaintiffs' appeal of right on counts I and II in docket number 212531.

Docket No. 212531

II

Plaintiffs raise three issues in this appeal, two of which are interrelated and are considered together. Plaintiffs assert that 1) the Supreme Court's decision in *Paragon Properties Co* v *Novi*, 452 Mich 568, 571; 550 NS2d 772 (1996), which requires an appeal to the ZBA before a judicial claim ripens, is inapplicable here because the ZBA lacks subject-matter jurisdiction over appeals from PUDs and from referenda; and that 2) because the ZBA lacked subject-matter jurisdiction over plaintiffs' PUD appeal, but nevertheless heard it granted a variance, the ZBA's variance is void and inapplicable to this appeal.

Plaintiffs reason as follows: They sought and obtained approval for a PUD, but a referendum vote rejected the PUD rezoning. They filed their appeal with

the ZBA knowing that the ZBA lacked subject-matter jurisdiction over appeals involving PUDs or referenda, but mindful of *Paragon's* instruction that futility is no excuse. *Paragon* instructs a trial court to consider a variance when evaluating the extent of a plaintiff's injury under a zoning ordinance, but that instruction assumes that the variance was granted by a ZBA with subject-matter jurisdiction, a circumstance that did not exist in the instant case. The only administrative decision plaintiffs could take to the ZBA was the decision granting them PUD zoning and plaintiffs knew, and presumably the ZBA knew as well that the ZBA lacked jurisdiction over such an appeal. The trial court should have recognized that the variances were a nullity and therefore should not have considered the variances in its takings analysis. *Paragon's* rule of finality does not control this case because plaintiffs could not exhaust administrative remedies if the only administrative agency available to review the case lacked subject-matter jurisdiction.

A challenge to subject-matter jurisdiction may be raised at any time and presents a question of law this Court reviews de novo. *Bass v Combs*, 238 Mich App 16, 23; 604 NW 2d 727 (1999).

Plaintiffs are correct that § 28.02 of defendant's zoning ordinance precludes the ZBA from hearing and deciding appeals "from any decision or order of the Planning Commission with respect to applications for special use permits or planned unit developments." However, plaintiffs' argument rests on an erroneous categorization - - that the variance application they filed with the ZBA was an appeal from a PUD decision. Amicus curiae advance a similar categorization, arguing

that the ZBA had no authority "to review or approve Appellants' PUD after it was overturned by referendum," and that "under the guise of granting variances, the ZBA totally redesigned Appellants' PUD." As defendant argues, the record is clear that the application plaintiffs filed with the ZBA requested variances from area, frontage, and density requirements of the AG zoned property, and that the filing occurred after the referendum that defeated the PUD amendment to the zoning ordinance, i.e., after plaintiffs' property had reverted to its pre-amendment zoning classification. Because no PUD determination from which to appeal existed at the time, plaintiffs' variance application was not an appeal from a PUD decision.

Plaintiffs argue that even assuming that their appeal to the ZBA did not involve a PUD, the ZBA still lacked subject-matter jurisdiction because § 28.02(a) of defendant's zoning ordinance provides that the ZBA "hear and decide appeals from and review any order, requirements, decisions, or determinations made by any administrative official," and in this case there was no decision or determination by an administrative official. This argument also fails.

Under the TZA, zoning boards of appeal are authorized to grant variances from the requirements of a zoning ordinance:

> Zoning variances are generally granted or denied by the local board of zoning appeals, See MCLA 125.220, .290, .585, MSA 5.2961(20), .2963(20), .2945. Townships have authority to grant

variances under the following provisions of MCLA 125.293, MSA 5.2963(23):

> [. . . .] Where there are practical difficulties or unnecessary hardship in way of carrying out the strict letter of the zoning ordinance, the board of appeals . . . may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done.

Johnson v Robinson Township, 420 Mich 115, 123, 359 NW2d 526, 530 (1994); *Compton Sand & Gravel Co v Dryden Township*, 125, Mich App 383, 396, 336 NW 2d 810, 815 (1983). [Cameron, Michigan Real Property Law. § 23.12. p 1070.]

The TZA provides that a ZBA "shall hear and decide all matters referred to it or upon which it is required to pass under an ordinance adopted pursuant to this act." MCL 125.290; MSA 5.2963(20). Pursuant to its statutory authority under the TZA, defendant authorized its ZBA to grant variances through § 28.04 of its zoning ordinance, which provides that the Board "shall have the power to hear and decide . . . any request for interpretation of the Zoning Ordinance, requests for

variances and decide any special questions on which the Board is authorized to pass." The TZA further provides that ZBA's "may impose conditions with an affirmation decision pursuant to section 16d(2)." MCL 125.293; MSA 5.2963(23). Section § 16d(2) of the TZA provides that the conditions may include conditions "to ensure compatibility with adjacent uses of land." Section 28.04 of defendant's zoning ordinance authorizes the ZBA to grant variances such as those granted in this case, i.e., involving area, frontage and density requirements, and to grant less of a variance than requested by the applicant.

Thus, because plaintiffs' request for variances is improperly characterized as an appeal, and the ZBA was authorized to consider and act on plaintiffs' variance application, the variances, which plaintiffs may choose to ignore altogether, are not void as a matter of law and the trial court did not err in taking the variances into account in its takings analysis.

III

Plaintiffs next advance a substantive due process challenge, arguing that no legitimate governmental interest is advanced by the present AG zoning classification, and that the referendum's result and AG zoning arbitrarily and capriciously exclude other types of legitimate land use. Plaintiffs assert that the referendum's rejection of the PUD rezoning constituted a taking because it deprived them of their PUD zoning, necessitated a stop of all infrastructure construction work then in progress, and deprived them of their legitimate investment-backed expectations.

A zoning ordinance challenge on substantive due process grounds requires the following proof: (1) that no reasonable governmental interest is advanced by the present zoning classification, or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question. *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Three basic rules of judicial review apply:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Frericks, supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Plaintiffs argue that the trial court erred in concluding that defendant had a reasonable interest in preventing incompatible and uses because both single-family residences and intensive agricultural operations are permitted uses in the AG zone, thus, by definition, there is no incompatible use at issue. They further argue that their expert land-planner testified that the zoning ordinance demonstrates that continued AG zoning is inappropriate when public water and sewer become

available, and that that position is supported by the planning commission and township board's approvals of the PUD rezoning. Plaintiffs argue that their expert land-planner testified that the PUD met defendant's 1980 master-plan goal of increasing the supply of land available for residential development and encouraging PUD housing, and met the 1996 master plan goals. Plaintiffs argue that their appraiser testified that plaintiffs' highest and best use was for residential development.

The record establishes that plaintiffs' land is immediately adjacent to the east boundary of an intensive turkey farm operation that Harley Sietsema purchased in 1979, ten years before plaintiff purchased the property at issue. The Sietsema farm processes about 200,000 turkeys a year, and houses structures that include barns, equipment storage and manure recycling storage buildings, grain bins, and dryers which operate twenty-four hours a day. Sietsema operates approximately twenty vehicles, including seven semi-tractors, bulldozers, combines, and pick-up trucks. Chemicals are applied to the field that is contiguous to plaintiffs' east boundary line, where crops are grown and turkey manure is spread. There was testimony that the farm generates noise, odors, dust, and chemicals. To protect the turkeys, Sietsema implemented a "bio security system," pursuant to which no one is permitted to enter the turkey barns without showering, changing clothes, and using disinfectant on their shoes.

The zoning ordinance pertaining to an AG district provides for certain permitted uses as a matter or right, including single-family residences with lots of not less

than one acre and frontage of not less than 150 feet, and:

A. Farms for both general and specialized farm operations, including the following agricultural activities:

1. crop production, including berry farms, row crops, orchard field crops, grain, hay, pasturelands and vineyards.
2. commercial animal raising. . .
3. farm buildings designed and constructed to store implements, hay, grain, poultry. . .
4. wholesale nurseries . . .
5. egg hatcheries.
6. confined animal feeding operations and intensive animal raising.

* * *

C. Conservation area for flora or fauna, forest preserve, game refuge.

D. Parks or recreation areas owned or operated by a government agency.

E. Permitted Accessory Uses.

1. Uses customarily accessory to farm operations.
2. Permitted accessory uses and buildings . . .
3. Home occupation as an accessory to a permitted use . . .

F. Adult foster care small group home, licensed

. . .

The TZA recognizes as a legitimate governmental interest the goals of insuring compatibility of adjacent uses of land, and insuring that the land use be consistent with public health, safety, and welfare. MCL 125.286d(2); MSA 5.2963 (16d). The 1996 Master Plan recommends that incompatibility between residential developments and adjacent agricultural land uses be addressed by a number of zoning techniques, including the use of open space. Defendant's community planning expert, Paul LaBlanc, testified at trial that the zoning of plaintiffs' property advanced several governmental interests, including to meet citizens' needs for food and fiber, to ensure the appropriate location and relationship of land uses to one another, and to protect the public health, safety and welfare. LaBlonc opined that the zoning ordinance, as modified by the variances, was consistent with defendant's 1996 Master Plan. Dr. David Skjaerlund, Executive Director for the Rural Development Council of the Michigan Department of Agriculture, testified that the zoning ordinance reasonable addressed defendant's interest in reducing the incompatibilities brought about by placing a residential development next to an established agricultural operation. He testified that it was inappropriate to locate seventy homes in a high-density fashion within fifty feet of a very intensive livestock operation, and that his experience was that when these two property uses are adjacent to one another, conflicts arise in the form of nuisance complaints from residential neighbors.

Taking into account the evidence plaintiffs

presented, the trial court concluded that there was a clear and compelling governmental interest in preventing incompatible land uses and that a closely adjacent residential development would be highly incompatible with the turkey-farm operation. The record supports that the defendant determined that a reasonable balance of land uses could be reached by limiting the density and number of lots on plaintiffs' AG property to twenty one-acre lots, or by allowing plaintiffs, through the variance, to increase the density and number of lots, provided that they left an open space separating the residences from the adjacent turkey farm. Defendant also adopted as a condition to the variance a sunset clause that would terminate the open space requirement after the adjacent property ceased being used for intensive agricultural operations. There was ample trial testimony to support the trial court's findings of incompatibility, and that the AG zoning of the property reasonably served to decrease that incompatibility. The record supports the trial court's determination that plaintiffs failed to prove that there is no room for legitimate difference of opinion on the reasonableness of the zoning of their property. The trial court properly determined that plaintiffs' substantive due process claim fails.

To the extent plaintiffs argue that the referendum was the equivalent of an arbitrary and capricious denial of the PUD, this argument also fails. The PUD provided for a buffer between the turkey farm and the lots adjacent to it. Although the existing zoning permitted the development of lots immediately adjacent to the turkey farm, it minimized the number of such lots by requiring one acre/150 foot wide lots. It would not be arbitrary or

capricious to reject the PUD on the basis that it allowed too many homes to be constructed too close to the turkey farm.

Plaintiffs also argue that even assuming that an incompatible use exists, defendant cannot impose an unconstitutional burden on plaintiffs to solve this problem, requiring the 7.5 acre designated open space constitutes a taking without just compensation, and that neither the TZA nor the right to farm act, MCL 286.471 *et seq.*; MSA 12.122(1) *et seq.*, authorize defendant to require plaintiffs to provide land to be used to abate the noise, dust and odor nuisances from the Sietsema turkey farm.

A government may effectively "take" a person's property by overburdening that property with regulations. *K & K Construction v DNR*, 456 Mich 570, 576; 575 NW2d 531 (1998). The Fifth Amendment is violated "when land use regulation 'does not substantially advance legitimate state interest or denies an owner economically viable use of his land.'" *Lucas v So Carolina Coastal Council*, 505 US 1003, 1016; 112 S Ct 2886; 120 L Ed 2d 798 (1992); *K & K Construction, supra* at 576. In determining whether zoning regulation effects a taking, the owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned. *Bevan v Brandon Twp*, 438 Mich 385, 403; 475 NW2d 37 (1991). The diminution of property value by application of regulations, without more, does not amount to an unconstitutional taking. *Paragon, supra* at 579 n 13, citing *Penn Central Trans Co v New York*, 438 US 104; 98 S Ct 2646; 57 L. Ed 2d 631 (1978).

Plaintiffs' argument that the 7.5 acre designated open space requirement constituted a taking without just

compensation overlooks a principal fundamental to takings analysis - the "nonsegmentation" principle:

> This principle holds that when evaluating the effect of the regulation on parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel. [*K & K Construction, supra* at 578-579.]

Plaintiffs are only required to maintain the open space if they choose to use the variance option. The variance offers plaintiffs additional flexibility in the use of their property; they need not use the variance.

The zoning ordinance as applied to plaintiffs property does not effect an unconstitutional taking. As found by the trial court, the AG-zoned parcel could be used for agricultural purposes or residential use under the AG zoning:

> . . . Of the original Knoper farm, plaintiff made a gift of the corner piece to his mother's charity ($20,000) and leased the two houses for an unspecified fee and also leased the farm land. Defense witness James Crum testified the soils are suitable agriculture [sic]: ornamental trees, bent grass and sod for athletic fields. Harley Sietsema testified he paid over $3,000 an

> acre for similar farm land. Stanley Boelkins, a real estate appraiser, said there was a strong demand for non-farm rural homesites with acreage. To establish a taking plaintiffs must show the restrictions in the zoning ordinance preclude its use for any purpose to which it is reasonably adapted. This property has considerable value as farmland ($90,000) and $200,000 for rural residential (Boelkins).

Further, defendant did not impose the open-space requirement pursuant to the right to farm act or to abate the adjacent nuisance. Defendant did so as a condition of granting plaintiffs that which plaintiffs asked for. Again, plaintiffs are free to ignore the variances and develop the property without the buffer zone in according with the existing zoning.

Thus, plaintiffs' taking claims fail, as they did not establish that the zoning ordinance deprived them of economically viable use of the land. *K & K Construction, supra* at 576-577.

Nos. 219743 and 219744

IV

A

Initially, we note that defendant asserts that this Court lacks jurisdiction over the appeal. We find it unnecessary to address the substance of defendant's argument in this regard in light of the Supreme Court's

order of remand to this Court.

Defendant also asserts that plaintiff lack standing to appeal the ZBA decision because they are not aggrieved parties. "In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be "aggrieved." *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975). A plaintiff must allege and prove that he suffered some special damages not common to other property owners similarly situated. Proof of general economic loss is not sufficient to show special damages. *Id.*

> Generally, an aggrieved party is one whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order. It is a party who has an interest in the subject matter of the litigation. [See, e.g., *In re Freeman Estate*, 218 Mich App 151, 155;553 NW2d 664 (1996).] While this definition requires that the court examine the subject matter of the litigation in each case and then determine a party's interest in it, certain general rules are applied to all situations.
>
> The first obvious rule is that a person who is not "aggrieved" by a judgment or order cannot be an aggrieved party. Somewhat less obvious, however, is the requirement that the party must be aggrieved by the act of the court, i.e., the judgment or order, and not by the party's own action. Thus a party who enters into a consent judgment,

> or agrees to the entry of a mediation award, or who actually receives the relief requested in the complaint is not an aggrieved party and has no further right of appeal. [7 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 7.203 P 139.]

Defendant argues that because plaintiffs are not claiming that the ZBA should have granted them more relief than they received, they are not aggrieved. It argues that plaintiffs are requesting that this Court destroy the variance relief that defendant granted plaintiffs, which, defendant argues, increased the flexibility in their permitted use of the property by giving them more leniency than the applicable area, frontage and density requirements would have permitted them under the zoning ordinance. We disagree.

While plaintiffs were granted some relief through the variances, they were not granted the full relief requested. Plaintiffs contend that their legal rights pecuniary interest have been affected by the trial court's determination. Plaintiffs argue that the ZBA's decision-making process deprived them of procedural due process, and that its imposition of the condition that plaintiffs maintain a 7.5 acre open space constituted a temporary taking without just compensation. Plaintiffs contend their pecuniary interest was directly affected because before the ZBA granted the variance and under the existing AG zoning, plaintiffs could build houses on the 7.55 acre open space, while the ZBA's condition requiring the open space prohibits plaintiffs from using the 7.55 acres for building houses until one year after the

turkey farmer decides to cease operating the farm.

B

Plaintiffs assert that the ZBA's decision was not supported by competent, material and substantial evidence, and the circuit court erred in concluding otherwise.

A reviewing court must defer to determinations of fact made by a ZBA if supported by competent, material and substantial evidence on the whole record. *Macenas v Michiana,* 433 Mich 380, 395; 446 NW2d 102 (1989); *Gordon v Bloomfield Hills,* 207 Mich App 231, 232; 523 NW2d 806 (1994). This Court "must give due deference to the agency's regulatory expertise and may not 'invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views.'" *Davenport v Grosse Pointe Farms Zoning Bd,* 210 Mich App 400, 405-406; 534 NW2d 143 (1995), quoting *Gordon, supra* at 232.

Plaintiffs argue that the ZBA's utilization of a two-step process to decide plaintiffs' appeal "evidences an intent to separate the collection of evidence, which occurs during or before the public hearing, from the decision-making process, which occurs during the public meeting." They argue that the first step was the January 9, 1997 public hearing, at which plaintiffs' counsel explained the need for variances and residents expressed their thoughts. Plaintiffs note that no spokesperson of defendant addressed the ZBA about plaintiffs' proposed development, nor did defendant submit documentary evidence, other than the staff report. The second step,

according to plaintiffs, was the February 3, 1997 public meeting, during which defendant's zoning administrator presented his twenty-page staff report and recommendation to the ZBA and answered questions, and the ZBA voted later in the meeting to adopt the report and recommendations. Plaintiffs argue that the staff report contained findings of fact that were not supported by evidence presented at the public hearing, and that the ZBA had no evidentiary basis for elevating those unsupported statements into findings of fact. Plaintiffs note that the ZBA received no evidence that plaintiffs' AG-zoned property could reasonably be used for agricultural purposes or for an adult foster care small group home, and no evidence regarding the water table level, soil, feasibility of using septic systems on the AG-zoned land, costs to develop plaintiffs' property with a 7.55 acre open area, the rationale for requiring the 7.55 acre open area as a buffer from the adjacent turkey farm, and the effectiveness of deed disclaimer statements.

After the staff report was received into the record by the ZBA, the zoning administrator at the February 3, 1997 meeting covered the items in the report and the board discussed the facts the administrator presented, before the ZBA adopted the report's findings of fact. Plaintiffs, who were represented by counsel, made no objections. There is ample record evidence to support the ZBA/s determination. Plaintiffs' reply brief does not dispute that plaintiffs acknowledged during the public hearing that their property in the AG district had been and was being used for asparagus production. Nor do plaintiffs dispute that their site plan contained the information needed to determine the economic feasibility

of developing lots under the variance. Plaintiffs do not dispute that they presented no evidence that the AG property could not be used for an adult foster care home. Nor do plaintiffs dispute defendant's contention that the zoning ordinance, master plan, plaintiffs' site plan, and testimony presented below contained facts to support the ZBA's determination. Thus, plaintiffs' claim fails.

Plaintiffs also assert that the ZBA failed to provide them with procedural due process during the February 3, 1997 public meeting when the staff report was introduced, discussed, and relied upon.

In general, due process requires notice of the nature of the proceeding, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. *Klco v Dynamic Trading Co,* 192 Mich App 39, 42; 480 NW2d 596 (1991). The opportunity to be heard does not require a full trial-like proceeding, but does require a hearing to the extent that a party has to know and respond to the evidence. *Id.*

Defendant argues, and plaintiffs do not dispute, that plaintiffs in the instant case initiated the proceedings by filing a variance application, received notice of the proceedings, and were present at both hearings with counsel. Plaintiffs were given opportunity to provide information with their variance application and presented their position at the January 9, 1997 hearing. Plaintiffs do not dispute that they received a copy of the staff report prepared by defendant's township zoning administrator at the beginning of the February 3, 1997 meeting, but did not present questions to the administrator. Plaintiffs did not object when the motion was made for the ZBA to approve the proposed

resolution. After the resolution was adopted, plaintiffs asked to make a statement, and the board advised them to put the statement in writing. Plaintiffs did not do so. The record does not support plaintiffs' argument that they were not given opportunity to challenge the staff report's contents.

Plaintiffs' final argument is that the ZBA's decision is not a reasonable exercise of discretion as required under the TZA. Plaintiffs argue that nothing in the TZA or defendant's zoning ordinance allows the ZBA to "redesign, reconfigure, downsize, or rezone plaintiffs' proposed development or to impose a 7.55 acre open area." Plaintiffs argue that the 7.55 acre open space "is an invalid exercise of the police power because it grants the turkey farmer effective control over when the land may be used for residential purposes." Plaintiffs argue that the ZBA abused its discretion be effectively rezoning plaintiffs' land under the guise of granting a variance.

These arguments appear to be reassertions of arguments addressed and rejected above. Defendant was authorized under TZA and zoning ordinance to consider plaintiffs' variance application and to grant the variances it did. The variances granted did not take away rights from plaintiffs. Plaintiffs are free to develop their entire property as originally zoned, into one-acre residential lots. If plaintiffs choose to use the variances, they will not be able to build a structure or road within the designated open space, *in exchange for* being able to build additional lots with smaller permitted widths and area than under the original zoning. The sunset clause plaintiffs object to is a benefit to plaintiffs, since elimination of the sunset clause would make the conditions permanent. The

sunset clause is tied to conflicting land use, it is not an unlawful delegation of authority to the turkey farmer. As discussed previously, there is ample record support for the court's findings that plaintiffs' proposed residential development would have a negative impact on the turkey farm operation.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

1. This application was assigned docket number 212219.
2. This application was assigned docket number 212532.
3. This appeal of right was assigned docket number 212531.
4. The defendant in *Paragon* denied the plaintiff's request to rezone a property parcel from single-family residential to mobile home district zone. The plaintiff brought suit alleging that the property had no economic potential for development as zoned, the highest and best use would be for mobile home development, that the defendant's denial of its rezoning request unconstitutionally deprived it of its property in violation of due process, and that the zoning ordinance as applied to property was unreasonable, confiscatory, and discriminatory. 452 had not sought a use variance from the ZBA and thus had not obtained a final decision

regarding the potential uses of the property. The circuit court denied the motion and at trial held that the zoning ordinance as applied effected an unconstitutional taking. This Court reversed on the basis that the constitutional claim was not ripe because the plaintiff had not sought a variance from the ZBA and had not brought a state inverse condemnation claim. *Id.* at 573. The Supreme Court affirmed, concluding that Paragon's constitutional claim was not ripe for review because it failed to obtain a final decision from which an actual or concrete injury could be determined:

> A challenge to the validity of zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. *Lake Angelo Associates v White Lake Twp,* 198 Mich App 65, 70; 498 NW2d 1 (1993), citing *Wiliamson Co Regional Planning Comm v Hamilton Bank of Johnson City,* 473 US 172, 186; 105 S Ct 3 108; 87 L

Ed 2d 126 (1985).

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . .
>
> * * *
>
> The finality requirement aids in the determination whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted in *Williamson*, factors affecting a property owner's investment-backed expectations "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it

> will apply the regulations at issue to the particular land in question." [*Paragon, supra* at 576-579.]

5. Section 28.02 of the zoning ordinance provides in pertinent part:

> In addition to the duties and powers described in the previous sections of this ordinance, the Board of Appeals shall hear and decide all matters relating to the following:
>
> A. The Board of Appeals shall hear and decide appeals from and review any order, requirements, decisions, or determinations made by any administrative official charged with the enforcement of any provisions of this ordinance, except that the

Board of Appeals shall not hear and decide appeals from any decision or order of the Planning Commission with respect to applications for special use permits or planned unit developments, nor shall it hear appeals from the decisions of the Township Board regarding the same matters.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

PHILLIP D. FORNER,
F. & B. DEVELOPMENT,
L.L.C. and ALLENDALE
HEATING CO., a Michigan
corporation,

Plaintiff,

v

ALLENDALE CHARTER
TOWNSHIP, a Subdivision
of the State of Michigan
Defendant.

Case No: 95-23665-CZ
HON: WESLEY J.
NYKAMP

_____/

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_____/

JUDGMENT

At a session of said Court held
in the Ottawa County Circuit Court,
Grand Haven, Michigan, on 5 June, 1998.

PRESENT: HON. WESLEY J. NYKAMP

In accordance with the Court's Opinion filed in this cause on June 27, 1997, after having concluded the bench trial in reference to Count I and II in the Plaintiff's First Amended Complaint, and a separate Opinion and Order having been entered by the Court on May 14, 1998, resolving Count III of the First Amended Complaint in the defendants favor;

A JUDGMENT is hereby entered in favor of the defendant, Allendale Charter Township, against the plaintiffs Phillip D. Forner, F&B Development, L.L.C. and Allendale Heating Company, denying all of the relief they requested in Counts I and II in the Plaintiffs' First Amended Complaint; and

It is further ordered that as the prevailing party on Counts I and II in the Plaintiffs' First Amended Complaint, the defendant, Allendale Charter Township, shall be and hereby is awarded costs against the plaintiffs in the amount of $9,746.30.

s/Wesley J. Nykamp
Honorable Wesley J. Nykamp

Approved as to form and for entry:
s/Thomas C. Shearer
Thomas C. Shearer (P20318)

Attorney for Plaintiff

s/James R. Nelson
James R. Nelson (18233)
Attorney for Defendant

ATTEST TRUE COPY
s/Frances M. Pobeneki
DEP. OTTAWA COUNTY CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

PHILLIP D. FORNER,
F. & B. DEVELOPMENT,
L.L.C. and ALLENDALE
HEATING CO., a Michigan
corporation,

Plaintiff,

v

ALLENDALE CHARTER
TOWNSHIP, a Subdivision
of the State of Michigan,

Defendant.

OPINION
File No. 95-23665-CZ

This is a zoning case. Plaintiffs claim the defendant's referendum of its board's ordinance is an unconstitutional taking or an unreasonable zoning of their property, and that the variance granted by the Township does not cure the unreasonableness of the current zoning. This court disagrees and finds plaintiffs have no cause for action.

The salient facts that emerged from many days of trial are: Plaintiffs collectively own about 38 acres in Allendale Township. Plaintiff Phillip Forner is president of Allendale Heating Company, Inc., which owns parcel "A" on the attached Exhibit. Forner individually acquired parcels "B", "C" and "D", which previously made up the Knoper veal stock raising farm (27.25 acres). He bought the farm through a sealed bidding process for $128,000 in 1989. The only other bidder, Harley Sietsema,

owns the property to the east of the farm dropped out of the bidding when he realized his neighbor, Forner, wanted the land that surrounded his heating business parcel.

Parcel "B" is part of the Knoper Farm with two houses and out buildings retained by Forner. The value of the farm house with the large pole building is at least $30,000. He rents or leases the buildings to others. Parcel "C" also part of the former Knoper farm was given by Forner to "Love Inc.", a nonprofit charitable organization founded by Forner's mother. Lots of its size were valued at about $20,000. Parcel "D" is 25 acres of farm land, a substantial portion of which is asparagus producing. Forner receives $3,500 a year from an asparagus producer who harvests and sells the crop. The productivity of the field is diminishing as the plants are not being replaced as the become less productive.

In 1994, Forner and Ken Blakeley formed a limited partnership to acquire an existing subdivision project immediately south of the Forner property (Parcel "E"). They agreed to pay for the land and engineering costs, a total of $95,562.

Forner and Blakeley intended to continue the development of parcel "E" and incorporate it into a larger development with Parcel "D". Parcel "E" was zoned R1-A and R1-B. Forner and Blakeley asked the Township to rezone "D" from AG (agricultural - rural residential) to R-1. The Township planner recommended that they apply for PUD and include the Allendale Heating, the commercially zoned parcel, and parcel B. The developers proceeded with their project following the advice of planners and designed a 70 lot plat called

Brookland Estates. The PUD was approved by the planning commission and then enacted into ordinance by the Township Board.

The PUD imposed two conditions relating to the adjacent agricultural property. Forner and Blakeley were to construct a 50 foot wide berm ("Buffer Zone") shown on the attached exhibit between Brookland Estates and the Sietsema Farm on the east side of the subdivision. Purchasers of lots in the subdivision were also to be informed that the lots they're buying are adjacent to an intensive agricultural operation.

This buffer and warning were deemed necessary because the Sietsema farm which lies slightly over the length of a football field to the east is an "intensive agricultural operation". There are turkey barns 60 feet by 521 feet and equipment and crop storage buildings 70 feet by 200 feet. They dry and store about 150,000 bushels of corn for turkey feed. The grain driers sound like turbo prop airplanes and run 24 hours a day for several months when crops are being readied for storage. Large farm tractors are used to plant and harvest crops on the field between the barns and the subdivision. Readying the field for planting includes the spreading of turkey manure and the dust generated by breaking the ground.

The land to the south of the Sietsema farm is platted into residential lots but there exists a heavily treed ravine that presents a natural buffer. There were no stipulations on these southerly residential plots requiring either notification of the farming operation or preservation of the natural buffer. As a practical matter, however, it is apparent further development could not

occur without Township approval.

After the defendant's board approved the PUD, Harley Sietsema and others circulated petitions for a referendum, and the defendant's PUD zoning ordinance for Brookland Estates was defeated by the electorate by an overwhelming vote. This vote, of course, caused the "F" parcel to return to R-1A and R-1B zoning and "A" parcel reverted to commercial and the remaining property agricultural - rural residential.

Before trial plaintiffs, following the direction of Paragon Properties v Novi, 452 Mich 568; 550 NW2d 772 (1996) petitioned the Zoning Board of Appeals for a variance permitting them to develop the 70 lot Brookland Estates as a variance from the existing zoning. The ZBA recognizing that it could not rezone under the guise of variance gave plaintiff a lot size variance from the one acre lots required under the AG and permitted the clustering of 24 lots (the number permitted in the zone) on the west side of the Forner property and preserved a 7.55 acre buffer zone between the clustered housing and the intense agricultural operation. The buffer zone would remain unimproved as long as the Sietsema property was used for intense farming.

In reaching the decision to create a 7.55 buffer the Township considered the engineering plaintiffs has already invested in the project and the fact that the buffer area could subsequently be developed per the plan. Plaintiffs claimed the restrictions put on the buffered zone would preclude them from developing their lots even if the Sietsema farm was developed residentially. While every witness conceded that's what the language of the variance said, it would be absurd to believe that

the farm would be developed residentially while still operating an intense agricultural operation or to conclude that under these bizarre circumstances the variance could not be amended.

Plaintiffs presented experts who opined that the 70 lot PUD was sound land use planning and the highest and best use of the land. They pointed out that the master plan for the Township contemplated low density residential for the area that comprised the Forner and Blakeley property. Low density residential means up to three residential units per acre. The 70 lots averaged just under one third of an acre each. The master plan is also explicit that, as public water and sewer become available, higher density that permitted by AG is the preferred use. The experts point to the two subdivision almost fully developed to the south and southeast which have brought water and sewer to the threshold of this proposed development; they submit that this development is a logical, planned and orderly continuation of the development of the Township. They contend that with water and sewer available to the PUD subdivision there is no rational basis for restricting the lot size to Rural residential, the planned configuration of lots was recommended by the zoning administrator, approved by its zoning board of appeals and the township board. The only reason the subdivision is not being developed as planned is the will of the people to restrict development into this agricultural area.

Harley Sietsema on the other hand very convincingly points out the incompatibility of development of residential lots at the threshold of his farm. Dr. David Skajaerlund, Executive Director of the

Rural Development Council of Michigan supports Sietsema's concerns about the incompatibility of the adjacency of low density residential with high intensity agricultural. The evidence preponderates that crowding residential to the borders of today's megafarms creates the problems succinctly outlined by Sietsema: Repeated complaints about odor, dust and noise. Curious children venturing into farm buildings which are susceptible to communicable diseases. Children playing or leaving toys in the corn rows through which the farmer must move his heavy equipment.

No one can say exactly how much isolation is necessary to buffer this incompatibility, but the natural buffer to the south appears to be sufficient and Sietsema has not experienced any problem with his southern neighbors. The zoning administrator and the Zoning Board of Appeals concluded the seven and a half acre buffer is sufficient. Section 5.08 of the Township Zoning Ordinance provides that a 10,000 square foot confined feeding operation must be at least 1300 feet from a residential development. The township's buffer zone allows for a reverse setback of about half that distance and it is reasonable.

When plaintiffs following Paragon merely sought as a variance what the voters disapproved as an ordinance, their action is viewed by this court as a procedural effort to avoid the impact of the decision without considering the substantive rule that a plaintiff who claims his property cannot be used for the zoned use should seek a variance before seeking court intervention. The courts are not super boards of appeals and must not act as such. Kirk v Tyrone Township, 398 Mich 429; 247

[N]W2d 848 (1976). But it is clear from this record that the ZBA's requirement for a buffer zone is reasonable and the restrictions placed upon its use are also reasonable.

In Count II of plaintiffs' complaint they seek damages for the temporary and permanent taking of their parcels. We are dealing with separate parcels here. Parcel "F" reverts to its former residential zoning with an approval plat for subdivision. There is no taking of this parcel. Of the original Knoper farm, plaintiff make a gift of the corner piece to his mother's charity ($20,000) and leased the two houses for an unspecified fee and also leased the farm land. Defense witness James Crum testified the soils are suitable agriculture: ornamental trees, turf grass, bent grass and sod for athletic fields. Harley Sietsema testified he paid over $3,000 an acre for similar farm land. Stanley Boelkins, a real estate appraiser, said there was a strong demand for non-farm rural homesites with acreage. To establish a taking plaintiffs must show the restrictions in the zoning ordinance preclude its use for any purpose to which it is reasonably adapted. This property has considerable value as farmland ($90,000) and $200,000 for rural residential (Boelkins). Therefore there is no taking of the property as a matter of law Bevan v Brandon Township, 438 Mich 385, 402-403; 475 NW2d 166 (1957).

Poirier v The Grand Blanc Township, 192 Mich App 539, 41 NW2d 762 (1992) is clearly distinguishable, in that case the property was determined to be valueless for single family development because of how it was situated. It had value only as an expansion of the adjacent mobile home park. In this case the adjacent

neighbor was ready and willing to buy this property for agricultural purposes. Plaintiff outbid him because he projected greater value for residential development in the future. He bought this property, however, with the clear understanding that zoning would have to be changed for residential development.

In Count I of their complaint plaintiffs claim the continued zoning of the Knoper farm as agricultural is in violation of due process of law guaranteed by the Constitution. A challenge to the constitutionality of a zoning ordinance is governed by the principles enunciated in Kirk v Tyrone Township, 398 Mich 429; 247 NW2d 848 (1976), to successfully challenge an ordinance plaintiff must prove

> (F)irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question Krop v Sterling Heights, 391 Mich 139, 158; 215 NW2d 174 (1979). The four rules for applying these principles are:
>
> 1. The ordinance is clothed with a presumption of validity
> 2. Plaintiff bears the burden of showing the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property: "It must appear that the (ordinance) is an arbitrary fiat, a

whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness. Kropf, 391 Mich 139, 162.

3. Plaintiff "must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purpose to which it is reasonably adapted." Kropf, 391 Mich 139, 162-163.

Applying the first criteria, this court finds there is a clear and compelling governmental interest in preventing incompatible land uses. In Poirier, supra, the court clearly discerned that a single family development simply did not fit in between a mobile home park and shopping centers. In this case there are at least four governmental concerns 1) maintaining the viability of successful farming operations, 2) preservation of farmland. 3) Minimize conflict among its residents by discouraging conflicting incompatibles land uses. 4) Administering the law in accord with the will of the people.

The present classification of Agricultural - Rural Residential preserves the viability of the intense agricultural activity on the adjacent parcel and buffers it from the residential; no high intensity agricultural operations could be maintained on the parcel but acreage lot residential use is permissible. The variance granted to plaintiffs permits them to cluster more than the maximum number of lots normally permitted under rural residential zoning to maintain the buffer. This is neither arbitrary nor unreasonable. While we allow that "there is room for a legitimate difference of opinion"

such as expressed by Dennis Larkin, plaintiffs distinguished community planner from Sault Lake City: That this land should be developed into planned urban development. His recommendation is to be based on the following: There is a demand for more residential lots; development is occurring along this major street; sewer and water are available; the master plan says this will eventually be low density residential; therefore, this plan must be approved. It matters not to him that this residential development of 25 acres is sandwiched between Allendale Heating's commercial piece and Sietsema's mega farm. As to this particular piece of property, this court finds there is a debatable question as to whether the best use with the highest investment return should defeat the present zoning which considers the agricultural activity on adjacent property. Consequently, plaintiffs have failed in their burden of proof which requires them to show there is no legitimate difference of opinion. Brae Burn, Inc, supra pp 432-433.

As to factor 3, this court has already discussed in relation to the taking issue its conclusion that the AG restrictions do not preclude it's use for purposes to which it is reasonably adapted - particularly the court determines that with the use variance granted by the Township, three quarters of the property can be developed in substantially the same manner provided in the PUD with one quarter left for future development when the need for a buffer no longer exists. Therefore, the court finds that the agricultural zoning with the use restriction granted by the township is not an unconstitutional, arbitrary or unreasonable restriction on plaintiffs' use of their property.

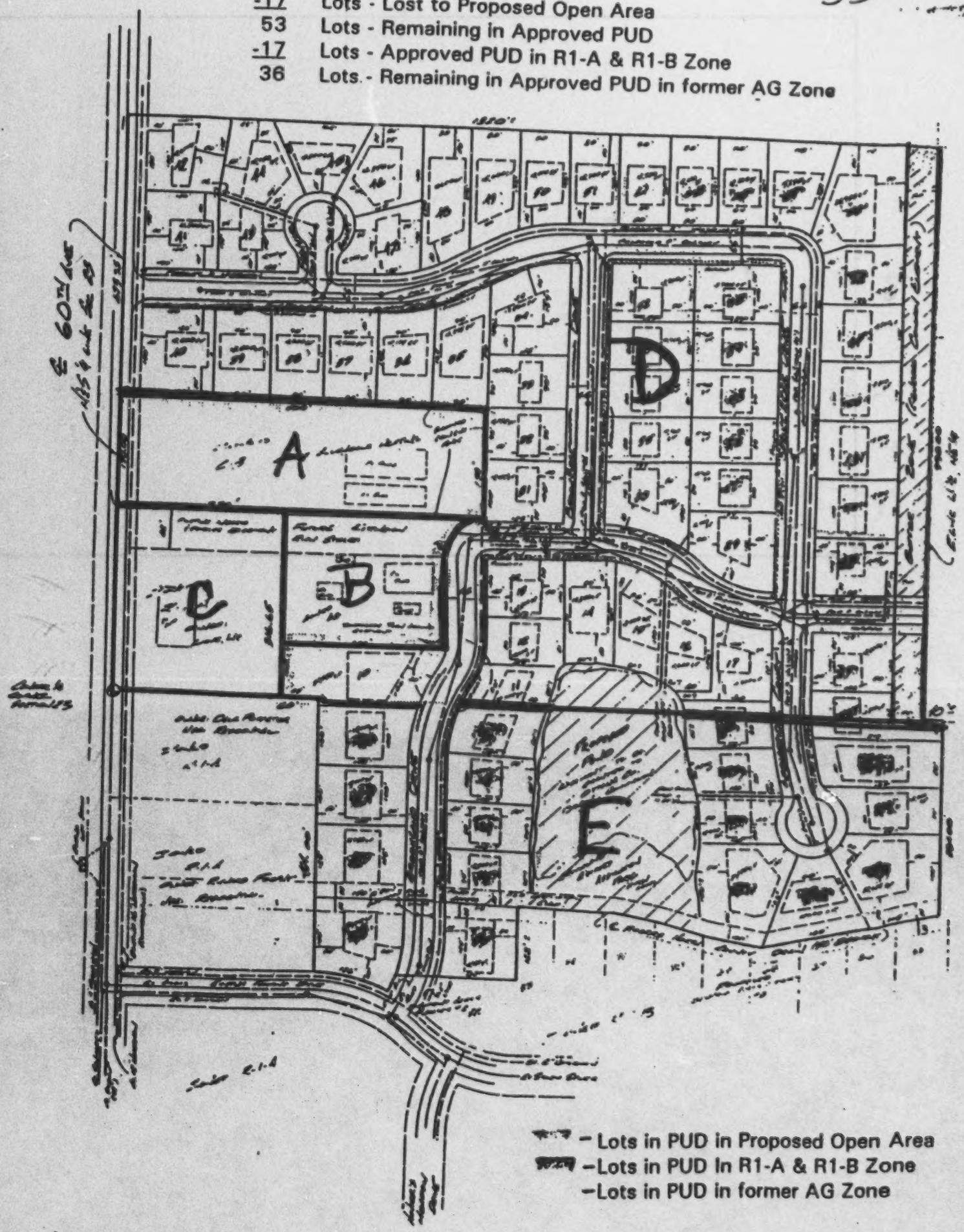
This court will deal with the issues raised by the appeal of the ZBA decision in a separate opinion, based upon the settled record submitted by the parties.

Dated: June 26, 1997

s/Wesley J. Nykamp
Wesley J. Nykamp,
Circuit Judge

PLAINTIFF'S EXHIBIT
53

70 Lots - Approved PUD
-17 Lots - Lost to Proposed Open Area
53 Lots - Remaining in Approved PUD
-17 Lots - Approved PUD in R1-A & R1-B Zone
36 Lots - Remaining in Approved PUD in former AG Zone



– Lots in PUD in Proposed Open Area
–Lots in PUD In R1-A & R1-B Zone
–Lots in PUD in former AG Zone

BEST AVAILABLE COPY

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OTTAWA

PHILLIP D. FORNER,
F. & B. DEVELOPMENT,
L.L.C. AND ALLENDALE
HEATING CO., a Michigan
corporation,
Plaintiffs/Appellants,
v
ALLENDALE CHARTER
TOWNSHIP, a Subdivision
of the State of Michigan,
Defendant/Appellee.

OPINION
and
ORDER

File No. 95-23665-CZ

Count III of the complaint is an appeal from the decision of the appellee township's zoning board of appeals (ZBA). On January 21, 1998, this Court issued an opinion and order deciding count III. On February 3, 1998, the Court ordered that the opinion and order of January 21, 1998 be held in abeyance pending additional briefing and a rehearing. The parties submitted additional briefs. A rehearing was held April 15, 1998. The opinion of the Court follows.

The standard of review in circuit court of a decision of a township zoning board of appeals is set forth in section 23a(1) of the township rural zoning act (TRZA), MCL 125.293a(1); MSA 5.2963(23a)(1), which provides:

> Upon appeal the circuit court shall review the record and decision of the board of

appeals to insure that the decision:
(a.) Complies with the constitution and laws of the state.
(b.) Is based upon proper procedures.
(c.) Is supported by competent, material, and substantial evidence on the record.
(d.) represents the reasonable exercise of discretion granted by law to the board of appeals.

The constitutionality of the ZBA's action was fully addressed by this Court in the opinion of June 26, 1997. The Court has heard nothing that would justify revisiting this issue. As to whether the ZBA's actions complies with the laws of this state, appellants argue that the ZBA acted unlawfully by: (1) "re-zoning" that portion of appellants' property that constitutes the buffer zone; (2) altering the density of the remaining portion of appellants' property; and (3) fostering the presence, expansion, and continuation of a non-conforming use on the parcel adjacent to appellants' property. Section 23 of the TRZA, MCL125.293; MSA 5.2963(23), provides that if a township zoning board of appeals grants a variance, the board may "impose conditions" on the grant of the variance. The three allegedly unlawful acts identified by appellants are conditions imposed on the grant of the variance and, therefore, pursuant to section 23 of the TRZA, are not unlawful.

Appellants next contend that the decision of the ZBA was not based on proper procedure. Specifically, appellants contend that they were denied due process because appellants were denied the opportunity to cross-examine the township's zoning administrator and to

challenge the accuracy of the report that he submitted to the ZBA. The ZBA offered appellants the opportunity for a rehearing by means of a request for reconsideration pursuant to section 28.06 of the township's zoning ordinance. A request for reconsideration of a decision of a township zoning board of appeals is permitted if the township's zoning ordinance contains a provisions that permits such requests. *Kethman v Osceola Twp*, 88 Mich App 94, 101-102; 276 NW2d 529, lv den 406 Mich 960 (1979). At a rehearing, appellants could have cross-examined the township's zoning administrator and could also have challenged the accuracy of his report. By failing to accept appellee's offer of a rehearing, appellants waived their opportunity to do so.

Finally: Having reviewed the record made before the ZBA, this Court is convinced that the ZBA's decision to grant the variance, with conditions, is supported by competent, material, and substantial evidence on the record and represents a reasonable exercise of the ZBA's discretion.

NOW, THEREFORE, IT IS ORDERED that the decision of defendant/appellee ZBA is affirmed. No attorney fees.

Dated: May 14, 1998

s/Wesley J. Nykamp
Wesley J. Nykamp,
Circuit Court Judge

ALLENDALE CHARTER TOWNSHIP
ZONING BOARD OF APPEALS

Date: February 3, 1997
Time: 7:00 p.m.
Place: Allendale Township Hall

Members Present:	Russell V Brown Jr., Robert Fansler, Mark Kidd, Ivan Kraker.
Members Absent:	Edward Elzinga.
Staff Present:	Phillip Brummel, Zoning Administrator.
Guests:	Refer Exhibit D. Attached

The meeting was called to order by the Chairman of the Board, Robert Fansler at 7:00PM.

At the beginning of the meeting, the Chairman explained the agenda to the Board and guests present. He specifically covered points 2, 3, 4, 5 of the agenda which outlines the sole purpose(s) and procedures to follow for this meeting.

Motion to accept the minutes of the January 09, 1997 Zoning Board meeting as amended below was made by Mark Kidd and supported by Ivan Kraker. **Motion Carried 4-0**

Corrections to the January 09, 1997 Zoning Board Minutes are as follows:

Page1 Change the motion for Secretary/Treasurer of the Board to read as Secretary of the Board (delete the word Treasurer).

Correct the spelling of the name supporting the motion to accept the

minutes of the October 10, 1996 Zoning Board Meeting as amended **from** Ivan Kracker **to read** Ivan Kraker.

Old Business: Reference Agenda marked **Exhibit A** and Notice of Public Hearing dated February 03, 1997 marked **Exhibit B** attached.

Hearing Item A: Phillip D. Forner Request

The first part of the continuation of this hearing tabled at the January 9, 1997 meeting, involved the review by the Board of the **Staff Report and Recommendations** dated January 31, 1997 (refer to Exhibit C attached) from Mr. Phillip Brummel, Zoning Administrator.

One should note that (1) this report was given to each member of the Zoning Board for their perusal on Friday, January 31, 1997 and (2) a copy of this report was also made available to the guests present at this hearing so that they could follow Mr. Brummel's presentation of the report to the Board.

The Zoning Administrator covered each item of his **Staff Report and Recommendations** in considerable detail utilizing a sketch of the property in question, as a visual aid for clarification purpose(s).

After the review of each article in his report, and before moving to the next article, the Zoning Administrator stopped his presentation, to determine if the Board had any questions relative to the material covered at that point. This format was followed thorough out his presentation.

After presentation of the **Staff Report and Recommendations** by the Zoning Administrator, a

motion was made by Russ Brown and **supported** by Mark Kidd to remove the item from table.

Motion Carried 4-0

At this point of the hearing, Mr. Brummel asked each Board member individually, if they had any questions or needed clarification of any item in his presentation and/or any other matters relative to the issue before the Board.

After the Board completed their review and discussed the facts presented by the Zoning Administrator in this case, the Zoning Administrator presented a proposed **Excerpts of Minutes** and **Resolution** for their consideration. This Excerpts of Minutes and Resolution is attached and marked **Exhibit E.** Mr. Brummel read the proposed document to the Board for consideration.

A **motion** to adopt the resolution presented in this document was offered by Mark Kidd and supported by Russ Brown.

Motion Carried 4-0

After the vote by the Board, Mr. Thomas C. Shearer, Attorney at Law, representing Mr. Forner, requested that he be allowed to make a statement relative to the Board's action. The Chairman, Robert Fansler, denied this request and explained to Mr. Shearer that the sole purpose of this meeting was as outlined in the Zoning Board's agenda and that a public meeting had already been held on this matter.

Although the Chairman denied Mr. Shearer request to speak, he encouraged him to put his statement in writing and send it to the Board.

There being no other matters to discuss before the

Board, the meeting was adjourned at approximately 8:00PM
/s/R. Brown Jr.
Russell V. Brown Jr.
Board Secretary

Exhibit A

AGENDA FOR ZONING BOARD OF APPEALS
FOR FEBRUARY 3, 1997

1. Call meeting to order.
2. Approval of minutes of January 9, 1997.
3. Purpose of meeting is to receive a staff report on the variance requested by Phillip Forner, et al regarding a development known as Brookland Estates. A public hearing was held on January 9 and public comment was heard and recorded.
4. The sole purpose of this meeting is to receive the staff recommendation, discussion and questions by the Board members, to approve, to approve with modification, to table for further information, or disapprove the variance request. Public comment will not be entertained. I will appreciate those present from inserting themselves into the Board's discussion of this matter.
5. Motion to approve adopting the staff recommendation, approve in accordance with the staff recommendation with modification, table for further information, or disapprove the request.
6. Other matters to discuss.
7. Adjourn

Exhibit B

ALLENDALE CHARTER TOWNSHIP
Post Office Box 539
Allendale, Michigan 49401
Voice: (616) 895-6295
Fax: (616) 895-6670

NOTICE OF BOARD OF APPEALS MEETING

DATE: FEBRUARY 3, 1997
TIME: 7:00 PM
LOCATION: ALLENDALE TOWNSHIP HALL

The Allendale Township Board of Appeals will be holding a meeting on Monday, February 3, 1997, at 7:00 PM at the Allendale Township Hall, 6676 Lake Michigan Dr., Allendale, MI.

It is the intent of the Board to remove from the table the F & B Development request, for a variance, that would allow for F & B to continue with the original P.U.D. of Brookland Estates. At the meeting, Township staff will present the findings of fact and make recommendations to the Board. The Board will then make a determination based on those findings.

Your presence at this meeting is recommended.

Sincerely,
/s/Phillip Brummel
Phillip Brummel
Building & Zoning Administrator
Allendale Charter Township
Home of Grand Valley State University

EXHIBIT C

STAFF REPORT AND RECOMMENDATIONS

DATE: January 31, 1997
TO: Allendale Township Zoning Board of Appeals
FROM: Philip Brummel, Zoning Administrator
SUBJECT: Application for Appeal Requesting Variances by Phillip D. Forner, F & B Development, L.L.C., and Allendale Heating Company

I. Background

Phillip D. Forner, F&B Development, L.L.C., and Allendale Heating Company collectively own approximately 37.62 acres of property at or adjacent to 11672 - 60th Avenue in Allendale Township. A 2.62 acre parcel of this property contiguous to 60th Avenue is zoned in the C-3 Service Commercial District. The south approximate 9.75 acres is zoned in the R-1A and R-1B Low Density One-Family Residential District. The remaining approximate 25.25 acres is zoned in the AG Agricultural and Rural District. Located on the west side of this AG property on 60th Avenue are 2 residential houses, a garage, a storage building, a pole barn, and a veal barn.

On October 24, 1994, the applicants, Phillip D. Forner, F&B Development, L.L.C., and Allendale Heating Company filed an application to rezone all of this property to a PUD Planned Unit Development District for the purpose of developing a site condominium

planned unit development known as "Brookland Estates PUD." On January 16, 1995, the Township Planning Commission voted to recommend approval of this rezoning application for Brookland Estates PUD and its corresponding proposed site plan containing 70 lots subject to certain conditions and waivers. At its regular meeting on April 10, 1995, the Allendale Township Board adopted ordinance number 1995-11 rezoning this property as recommended by the Township Planning Commission.

On May 9, 1995, petitions with sufficient signatures were filed with the Township Clerk requesting a referendum vote on the Brookland Estates PUD zoning amendment, ordinance number 1995-11, as authorized under the Township Rural Zoning Act. Pursuant to public notice, this referendum was duly held on August 8, 1995. This referendum to approve this proposed zoning ordinance amendment was defeated by a vote of 282 in favor of the rezoning and 809 against rezoning. Consequently, the zoning remained the same as before without changing to a PUD District.

On December 26, 1996, the applicants filed with the Zoning Board of Appeals an Application for Appeal requesting variances from certain provisions of the zoning ordinance so that they could proceed with the development of the Brookland Estates PUD. This is the first and only variance application filed by the applicants with respect to this proposed development.

At the regular meeting of the ZBA on January 9, 1997, commencing at 7:30 p.m., the ZBA conducted a public hearing on this application for the purpose of considering the comments, documentation, and other

evidence by the applicants, their attorney or other representatives, and/or any other interested residents and property owners. General background information was provided by the zoning administrator, Philip Brummel. Attorney Thomas Shearer made a presentation on behalf of the applicants. Comments from the audience were heard and a letter from one individual was read by the chairman in reference to the application. The applicants and/or their attorney responded to several questions from various members of the ZBA and the Zoning Administrator.

During the public hearing, the attorney for the applicants clarified that they are not seeking any variances in respect to the property currently zoned C-3. Further, in answer to questions, he acknowledged that they could develop the property within the R-1A and R-1B zoned districts without any problems in complying with the zoning ordinance provisions pertaining to that property. He clarified that their application was for the purpose of seeking a variance from the minimum 1-acre lot area and the minimum 150 foot front building line width requirements applicable to their property located in the AG district.

After everyone requesting permission to speak had been heard, the public hearing was closed. The ZBA then tabled the application and requested the zoning administrator to prepare a written report containing a proposed decision with findings and conclusions for their review, approval, rejection, or modification.

II. Recommended Action

After considering all of the evidence submitted at the public hearing, and based upon the findings of fact,

conclusions, and reasons set forth below, it is recommended that the ZBA take the following action on the Application for Appeal requesting variances by Phillip D. Forner, F&B Development, L.L.C., and Allendale Heating Company.

The application for variances in reference to the property located within the R-1A Low Density One-Family Residential District should be denied.

The application for variances in reference to the property located within the R-1B Low Density One-Family Residential District could be denied.

The application for variances in reference to the property located within the AG Agricultural and Rural District should be denied in part and granted in part. Variances from the lot area and width requirements contained in Article 5 Section 5.06D of the Township Zoning Ordinance should be granted in reference to the applicants' AG property to the following extent and subject to the following conditions:

1. The minimum lot area for dwellings shall not be less than 10,000 square feet. Corner lots shall not be less than 12,500 square feet.
2. The minimum width of each lot at the front setback line shall not be less than 80 feet. All corner lots shall have a minimum of 100 feet at the front setback line.
3. The maximum number of dwellings on this property located within the AG district, being approximately 25.25 acres, shall not exceed 28.
4. No dwelling, a structure accessory to dwelling, or a road shall be constructed within an area (hereinafter referred to as "open space") defined

as running from the northeast corner of the applicants' AG property along its eastern boundary line for a distance of 990 feet then west along a line perpendicular to its east boundary line for a distance of 190 feet, then north along a line parallel to the east boundary line for a distance of 335 feet, then in a westerly direction along a line perpendicular to the east boundary line for a distance of 215 feet, and then north along a line parallel to the east boundary line back to the north boundary line of the applicants' property. Subject to the above restriction, this open space may be used for any other purposes currently permitted under the provisions of the current Zoning Ordinance applicable to the AG Agricultural and Rural district in which this open space is located. These limitations pertaining to this open space shall continue and not be subject to any future applications for rezoning, variances, or other relief until such time as none of the property located between the 990 foot east boundary line of the applicants' AG property and 56th Avenue is used for a continuous period of one year as a "confined animal feeding operation" or for "intensive animal raising" as these terms are defined in the current Zoning Ordinance.

5. An earthen berm shall be constructed and maintained along the north 990 feet of the eastern boundary line of the applicants' property. This berm shall be at least 4 feet in height and be restored with top soil, seed, and mulch, and spruce trees which shall be at least 4 feet tall,

balled and burlaped, and shall be planted and maintained in a pleasing aesthetic condition at least 7 feet apart on center.

6. Any and all deeds conveying any interest in any property currently located in the AG district shall include the following disclaimer statement:

Neighboring Farming Activity. The property to the east and west of the - - herein insert name of development - - (which includes the property being conveyed in this deed) is presently zoned agricultural. Located immediately east of the - - in the herein insert name of development - - in the northeast one-quarter (1/4) of the Section 23 of Allendale Township there is an active confined animal feeding and/or intensive animal raising operation which includes and hereinafter shall be referred to as a "turkey farm."

Under the Michigan Right-To-Farm Act, Public Act 93 of 1981, as amended a farm or farm operation cannot be found to be a public or private nuisance: (i) if the farm or farm operation conforms to and utilizes generally accepted agricultural and management practices as determined by the State Agricultural Commission; and (ii) if the farm or farm operation existed before a change in the land use of land within one (1) mile of the boundaries of the farm land.

The entire - - herein insert name of development - - (including the property being conveyed in this deed) is located within one (1) mile of the boundaries of the turkey farm. So long as the turkey farm conforms to and utilizes generally accepted agricultural management practices, it cannot be held to be a public or private nuisance to any of the co-owners or occupants of the - - herein insert name of development - - including the property being conveyed in this deed.

7. The conditions contained above in paragraphs number 5 and 6 shall terminate whenever none of the property located between the 990 foot east boundary line of the applicants' AG property and the 56th Avenue is used for a continuous period of one year as a "confined animal feeding operation" or for "intensive animal raising" as these terms are defined in the current Zoning Ordinance.

8. No dwelling constructed on the applicants' AG property shall be required under Section 23.14G in the township's Zoning Ordinance to be connected to the public sewer or water supply.

9. All other applicable provisions of the township's Zoning Ordinance shall remain in force and effect including the applicants' right to seek any additional variances from any of the provisions contained therein.

Other than to the extent and subject to the conditions above stated, the application for variances in

reference to the applicants' property located within the AG district should be denied.

III.

Findings of Facts,
Conclusions, Reasons and Grounds for
Recommended Action

The findings of facts, conclusions, reasons and grounds for the recommended action by the ZBA include the following:

1. The powers and standards to be applied by the ZBA in granting variances are set forth in Article 28 Section 28.04 in the Township Zoning Ordinance, which sections are incorporated herein by reference.
2. The facts and conclusions contained in the section of this report entitled "Background" are also incorporated into this section by reference.
3. The applicants' do not seek or need any variance from any provision or requirement of the Zoning Ordinance applicable to that portion of their property located within the C-3 Service Commercial District. It can and is currently being used in compliance with the provisions of the Township Zoning Ordinance.
4. As acknowledged by the applicants, their property located within the R-1A district can be reasonably developed and used in compliance with the minimum lot and width requirements contained in the provisions of the Zoning Ordinance application to property located within the R-1A Low Density One-Family Residential District as found in section 7.05 A of Article 7.

5. As acknowledged by the applicants, their property located within the R-1B district can be reasonably developed and used in compliance with the minimum lot and width requirements contained in the provisions of the Zoning Ordinance applicable to property located within the R-1B Low Density One-Family Residential District as found in section 7.05 B of Article 7.

6. The permitted uses of land and buildings in the AG Agricultural and Rural District are set forth in Article 5 Section 5.02 as follows:

   A. Farms for both general and specialized farm operations, including the following agricultural activities:

      1. crop production, including berry farms, row crops, orchards, field crops, grain, hay, pasturelands and vineyards.
      2. commercial animal raising, including kennels, rabbit farms, fur bearing animal ranches, hog farms, dairy farms and cattle farms.
      3. farm buildings designed and constructed to store implements, hay, grain, poultry, livestock, or other horticultural products.
      4. wholesale nurseries, including tree or sod farm and greenhouses.
      5. egg hatcheries.
      6. confined animal feeding operations and intensive animal raising.

   B. Single family residence, no more than one

per parcel.

C. Conservation area for flora or fauna, forest preserve, game refuge.

D. Parks or recreation areas owned or operated by a government agency.

E. Permitted Accessory Uses.

1. Uses customarily accessory to farm operations.
2. permitted accessory uses and buildings, as regulated in Section 3.11 (1).
3. Home occupation as an accessory to a permitted use, as regulated in Section 23.07

F. Adult foster care small group home, licensed under Act 218 of the Public Acts of 1979, as regulated in Section 23.11 (2).

7. As acknowledged by the applicants during the public hearing, their property located in the AG district has been and is currently being used for crop production, i.e. asparagus. There has been no claim or evidence submitted that there is anything about the property (soils, topography, or otherwise) that would preclude it from being used for any of the general or specialized farm operations permitted under the ordinance. The past use of this farm as well as the apparent successful operation of adjacent property for agricultural purposes confirm that it can be reasonably used for such agricultural purposes. Further, the applicants have not applied for any variance or other relief from any restriction or

provision in the Zoning Ordinance that may somehow affect their ability to use this property for agricultural purposes.

8. There are no special conditions pertaining to the applicants' AG property that would cause any practical difficulty or undue hardship in using it for any of the agricultural purposes permitted under the ordinance.

9. At the public hearing on the variance application, no claim or evidence was submitted suggesting that the applicants' AG property could not be used for privately owned adult foster care small group home which is a permitted use to which the property could be put.

10. There are no special conditions pertaining to the applicants' AG property that would cause any practical difficulty or undue hardship in using the property for a privately owned adult foster care small group home.

11. Two residential homes and accessory structures are located on the west side of the applicant's approximate 25.25 acres of AG property at 60th Avenue. There are no special conditions that would cause any practical difficulty or undue hardship for the applicants in continuing to use this 25.25 acre farm, including residential structures, as one rural residential parcel under the applicable provisions of the Zoning Ordinance.

12. The minimum lot area and width requirements applicable to properly located in an AG Agricultural and Rural District area set forth in

Section 5.06D in the Township Zoning Ordinance which states as follows:

> **LOT AREA AND WIDTH.** The minimum lot area for dwellings hereafter erected shall be not less than one (1) acre and the width of the lot at the front building line shall be not less than one hundred fifty (150) feet. Any lot in existence at the time of adoption of this ordinance may be used for one single family dwelling provided that it meets the lot area and yard requirements of the R-1A Zone.

13. The applicants' AG property is contiguous to and fronts on 60th Avenue for a distance of 483.35 feet.
14. The applicants' could divide their AG property into 4 or less parcels with each parcel fronting on 60th Avenue.
15. The applicants could divide their AG property into 4 or less parcels with each parcel complying with the minimum lot area and width requirements of the Zoning Ordinance.
16. The applicants' could divide their AG property into 4 or less parcels of land with each being 10 acres or less in area and thereby not be subject to provisions of the Subdivision Control Act in 1967 or the standards enforced thereunder by any agency, including any requirement to connect to

any available and accessible public water and sewer. See Subdivision Control Act 1967, being MCL 560.101 et seq.

17. The water table level, soils and other conditions of the applicants' AG property would permit the use of individual private one-site septic systems under applicable standards if the applicants were to divide this property in a manner that would avoid the application of the Subdivision Control Act. At the public hearing, the applicants did not claim or present any evidence to the contrary.

18. The applicants could divide their AG property into 4 or less parcels without incurring any development cost for constructing any roads or connecting to public water or sewer.

19. There are no special conditions pertaining to the applicants' AG property that would cause any practical difficulty or undue hardship in dividing and developing their property into 4 or less parcels in full compliance with the minimum lot width requirements and all other applicable provisions of the Zoning Ordinance.

20. The township's Comprehensive Development Plan, as amended in 1996, projects the future use of the applicants' AG property to be "low-density residential." Before its amendment in 1996, the Comprehensive Development Plan projected the future use of the north approximate 450 feet of the applicants' AG property to be "agricultural" and the balance to be "low density residential."

21. Public water and sewer extends up Brookland Drive to within 200 feet of the south boundary line

of the applicants' AG property.

22. If the applicants were to divide their AG property in a manner that would trigger the application of the Subdivision Control Act, then they may be required to connect to the available and accessible public water and sewer which in turn, together with other utilities and roads, may increase the cost of developing their lots.

23. The applicants' AG property does have an irregular shape given the location of the applicants' C-3 property.

24. The Allendale Township Comprehensive Development Plan, as amended by the township's Transportation Plan, does reflect the interest of the township in eventually having Rich Street extend westward from 56th Avenue to 60th Avenue through the applicants' AG property.

25. In November 1995, the applicant did complete beyond its original size the expansion of a retention pond which divides their R-1 property and extends into the southern portion of their AG property. This retention pond services surface water drainage from the applicants' AG property as well as surface water drainage from the applicants' R-1A and R-1B property. This retention pond displaces land that could otherwise have been use for the development of lots in the applicants' R-1 and AG properties.

26. The property adjacent to the north 990 feet of the applicants' east AG property boundary line is zoned AG. On approximately 20 acres of that property, Harley Sietsema has owned and

operated for several years a large intensive turkey farm operation in which he has a large financial investment. As stated by Harley Sietsema at the public hearing, he purchased and invested substantially in this operation before the applicants purchased the subject adjacent property without suspecting that anyone would attempt to rezone the adjacent agricultural property to accommodate a residential development at a density greater than permitted under the current zoning.

27. The Sietsema turkey operation produces a great deal of odor, dust, noise, and activity that one may reasonably expect from such a large intensive turkey-farm operation. As Sietsema stated at the hearing, these conditions could potentially cause a very negative impact on any adjacent residential development. In turn, a residential development adjacent to such a turkey farm operation would have a very potentially negative impact on it. Sietsema could be faced with numerous complaints from such residential property owners even though his operation may conform to all generally accepted agricultural and management practices as required in the Michigan Right to Farm Act. In fact, as Sietsema stated at the hearing, such a development in excess of the densities permitted under the current zoning could cause a serious threat to his substantial investment in his operation. To remove this threat and protect his investment, Sietsema has even offered to purchase the subject property from the

applicants.

28. A residential development at a density greater than currently permitted in an AG district would be incompatible with an adjacent high intensity agricultural operation such as the Sietsema farm.

29. The above factors identified in paragraphs 20 through 28 constitute special and unique circumstances that may cause a practical difficulty for the applicants in developing the property at the maximum density that would otherwise be permitted under the Township Zoning Ordinance.

30. Harley Sietsema and other residents who spoke in opposition to the variance application at the public hearing advised that they would not object to a residential development if it were limited to the number of units that would otherwise be permitted under the ordinance provisions applicable to the applicants' R-1A, R-1B, and AG properties collectively.

31. Given the lot and width requirements applicable to R-1A, R-1B and AG properties under the zoning ordinance, the current zoning ordinance would permit a total number of 46 lots on the applicants' R-1A, R-1B and AG properties collectively of which 28 would have to be allocated to the applicants' AG property given the existence and location of the pond. The number of these lots were calculated by using an 18 percent land area deduction for road purposes which is the same average percentage reflected in the applicants' proposed PUD development site plan.

32. By clustering these 28 lots on part of their AG

property at a higher density per acre than currently permitted in an AG district, the applicants could substantially reduce their development cost to the approximate cost per lot reflected in their PUD development site plan.

33. By giving the applicants a variance on the minimum lot and width in reference to their property located in the AG district to a minimum lot area of 10,000 square feet (12,500 on corner lots) and a minimum lot width of 80 feet at the front building line (100 feet on corner lots), the applicants could reasonably and economically develop their property while leaving a reasonable and necessary buffer or open space along their east boundary line to help separate their development from the adjacent and incompatible agricultural operations.

34. The maintenance of an "open space" and earthen berm as defined and in the size described above under "Recommended Action" would be necessary to help reasonably and necessarily separate a residential development, to the extent permitted under "Recommended Action," from the adjacent and incompatible intensive agricultural operations.

35. To help reduce the resulting conflicts and complaints between the residential property owners and occupants in the applicants' proposed development and the owners and users of the adjacent incompatible intensive agricultural operation, and to be sure that purchasers of such residential homes be put on prior notice of the

existing adjacent turkey farm operation and its right to continue operations in accordance with the Michigan Right to Farm Act, it would be reasonably necessary for all deeds conveying any interest in the applicants' AG property to include a disclaimer statement as described above under "Recommended Action."

36. The townships's Zoning Ordinance permits the ZBA to grant the applicants variances with a lesser relaxation than they applied for. See article 28 Section 28.04B.

37. Given the special and unique circumstances in this case, requiring compliance with the strict letter of the minimum lot area and width requirements in respect to the applicants' AG property may be unnecessarily burdensome or cause some practical difficulty for the applicants in reasonably developing their property to the maximum density otherwise permitted.

38. Granting variances to the applicants to the extent and subject to the conditions set forth above under "Recommended Action" would (1) not be contrary to the public interest, (2) would ensure that the spirit of the ordinance is being observed, public safety secured, and substantial justice done, and, (3) although a lesser relaxation than applied for by the applicants, would give substantial relief and justice to the applicants while being consistent with justice to other property owners.

39. With the benefit of the variances granted to the limited extent and with the conditions set forth above under "Recommended Action," the literal

enforcement of the provisions and requirements of the ordinance would (1) not cause any practical difficulty to the applicants, (2) not unreasonably prevent the applicants from using the property for a permitted purpose, and (3) would not render conformity with such restrictions, conditions and provisions unnecessarily burdensome.

40. Granting any further relief to the applicants beyond the limited variances and conditions suggested above under "Recommended Action" would (1) be contrary to the public interest, (2) do substantial injustice to other property owners in the district, (3) violate the spirit of the ordinance, (4) threaten public safety, and (5) would otherwise cause substantial injustice to occur.

ZONING BOARD OF APPEALS

EXHIBIT D
Guests

Steve LaBrecque
Harley Sietsema
Rick Sietsema
Ray Burbach
Jim Nelson
Phil Forner
Ken Blakely
Tom Shearer
Larry Stanton
Curt Bruins
Mary Jo Knairf
Lucia Gregels
Gerard Gregels
Larry Bruins

Rec'd 2/3/97
/s/R. Brown Jr.
Russell V. Brown Jr.
Board Secretary

EXHIBIT E

EXCERPTS OF MINUTES

At a regular meeting of the Zoning Board of Appeals of the Charter Township of Allendale, Ottawa County, Michigan, held at the Township Hall at 6676 Lake Michigan Drive, Allendale, Michigan on the 3rd day of February, 1997, at 7:00 PM, local time.

Present: Brown, Fansler, Kidd, Kraker
Absent: Elzinga

Staff Present: Phillip Brummel

After certain other matters of business were concluded, the Chairperson stated the next order of business was the consideration of an appeal and request for variance by Phillip D. Forner, F & B Development, L.L.C., and Allendale Heating Company for variance from certain provisions of the Zoning Ordinance. This appeal and variance was tabled after a public hearing was held and closed at the January 9, 1997, meeting of the Zoning Board of Appeals. After a motion was made, supported, and adopted to remove the appeal and request for a variance from the table and after detailed consideration and discussion of the appeal and request for a variance and also the report attached hereto as Exhibit A, the following resolution was offered by Kidd and supported by Brown.

RESOLUTION

WHEREAS, Phillip D. Forner, F & B Development,

L.L.C., and Allendale Heating Companyhave appealed to the Zoning Board of Appeals and requested a variance so as to permit the development of the Brookland Estates Planned Unit Development in accordance with the approval previously granted by the Township Board;

WHEREAS, Article 28 of the Township Zoning Ordinance and Section 23 of the Township Rural Zoning Act require that certain procedures be followed with respect to appeals and variance requests including the holding of a public hearing with due notice;

WHEREAS, notice of the public hearing on January 9, 1997, was given by publication and mailing as required by the Township Rural Zoning Act and the Township Zoning Ordinance;

WHEREAS, on January 9, 1997, a public hearing was held and closed concerning the appeal and variance request, and the matter was tabled by the Zoning Board of Appeals with a request that the Zoning Administrator prepare a proposed findings and recommendations;

WHEREAS, the appeal and request for variance have been removed from the table for consideration at this meeting;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. That the Zoning Board of Appeals does herby act as follows:
   (a.) That the Zoning Board of Appeals does herby adopt as its decision Article II of the Staff Report and Recommendations attached to this Resolution as Exhibit A. All conditions contained in Article II are also hereby expressly adopted.

(b.) The Zoning Board of Appeals does herby adopt as its findings of fact, conclusions, reasons and grounds for its decision Articles I and III of the Staff Report and Recommendations attached to this Resolution as Exhibit A.

2. That all resolutions in conflict herewith in whole or in part are hereby revoked to the extent of any such conflict.

Yes: Brown, Fansler, Kidd, Kraker
No: None

Resolution declared adopted.

Dated: February 3, 1997

/s/R. Brown Jr.
Russell Brown Jr.
Secretary

[NOTE: **Exhibit A (Staff Report and Recommendations) to the Excerpts of Minutes is not reproduced again. It may be found on pages 54a-72a above.**]

Order
Entered: July 30, 2001

117083-85

Michigan Supreme Court
Lansing, Michigan
Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C. and ALLENDALE HEATING CO, INC.,
Plaintiffs-Appellants,
v
ALLENDALE CHARTER TOWNSHIP,
Defendant-Appellee.

SC: 117083-85
COA: 212531, 219743, & 219744
Ottawa CC: 95-023665-CZ

On order of the Court, the motion for reconsideration of this Court's order of April 30, 2001, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

IO724
Seal of the Michigan Supreme Court
Lansing

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and

complete copy of the order entered at the direction of the Court.

July 30, 2001

/s/Corbin R. Davis
Clerk

Order
Entered: April 30, 2001

Michigan Supreme Court
Lansing, Michigan
Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

117083-85

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C. and ALLENDALE HEATING CO, INC.,
Plaintiffs-Appellants,
v
ALLENDALE CHARTER TOWNSHIP,
Defendant-Appellee.

SC: 117083-85
COA: 212531, 219743, & 219744
Ottawa CC: 95-023665-CZ

On order of the Court, the application for leave to appeal from the May 26, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

E0424
Seal of the Michigan Supreme Court
Lansing

I, CORBIN R. DAVIS, Clerk of the Michigan

Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 30, 2001

/s/Corbin R. Davis
Clerk

Order
Entered: May 25, 1999

113602-2 & (27) (28)

Michigan Supreme Court
Lansing, Michigan
Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C. and ALLENDALE HEATING CO, INC.,
Plaintiffs-Appellants,
v
ALLENDALE CHARTER TOWNSHIP,
Defendant-Appellee.

SC: 113601-2
COA: 21219, 212532
Ottawa CC: 95-023665-CZ

On order of the Court, the motion for immediation consideration and the motion for leave to file brief amicus curiae are considered, and they are GRANTED. The application for leave to appeal from the November 9, 1998 decision of the Court of Appeals also is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted together with Forner v Allendale Charter Twp, Court of Appeals Docket No. 212531.

e0518
Seal of the Michigan Supreme Court
Lansing

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 25, 1999

/s/Corbin R. Davis
Clerk

Court of Appeals
State of Michigan

Michael J. Kelly
Presiding Judge
Martin M. Doctoroff
Helene M. White
Judges

Phillip D. Forner v
Allendale Charter Twp
Docket Nos. 212219 and 212532
LC No. 95-023665-CZ

The Court orders that these applications are CONSOLIDATED.

The motions for leave to file a reply brief are GRANTED.

The applications for leave to appeal are DENIED for lack of merit in the grounds presented.

Seal of the Court of Appeals
State of Michigan
Court of Appeals

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

November 9, 1998 /s/Carl L. Gromek
Date Chief Clerk

Pertinent sections of
MCL 125.271 *et. seq.*
The Township Zoning Act [TZA]
formerly known as
The Township Rural Zoning Act [TRZA]

MCL 125.271 Zoning ordinance for regulation of land development and establishment of districts; division of township into districts; purposes; uniform provisions; jurisdiction relative to wells; ordinance subject to electric transmission line certification act.

Sec. 1. (1) The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures; to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. For these purposes, the township board may divide the township into districts of such number, shape, and area as it considers best suited to carry out this act. The township board of an organized

township may use this act to provide by ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities which are involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the regulation of land development and the establishment of districts in areas subject to damage from flooding or beach erosion, and for that purpose may divide the township into districts of a number, shape, and area considered best suited to accomplish those objectives. Ordinances regulating land development may also be adopted designating or limiting the location, the height, number of stories, and size of dwellings, buildings, and structures that may be erected or altered, including tents and trailer coaches, and the specific uses for which dwellings, buildings, and structures, including tents and trailer coaches, may be erected or altered; the area of yards, courts, and other open spaces, and the sanitary, safety, and protective measures that shall be required for the dwellings, buildings, and structures, including tents and trailer coaches; and the maximum number of families which may be housed in buildings, dwellings, and structures, including tents and trailer coaches, erected or altered. The provisions shall be uniform for each class of land or buildings, dwellings, and structures, including tents and trailer coaches, throughout each district, but the provisions in 1 district may differ from those in other districts. A township board shall not regulate or control the drilling, completion, or operation of oil or gas wells, or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the

issuance of permits for the location, drilling, completion, operation, or abandonment of those wells. The jurisdiction relative to wells shall be vested exclusively in the supervisor of wells of this state, as provided in part 615 (supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.61501 to 324.61527 of the Michigan Compiled Laws.

(2) An ordinance adopted pursuant to this act is subject to the electric transmission line certification act.

MCL 125.273 Zoning ordinance; basis; considerations.

Sec. 3. The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare; to encourage the use of lands in accordance with their character and adaptability, and to limit the improper use of land; to conserve natural resources and energy; to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lessen congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements; and to conserve the expenditure of funds for public improvements and services to conform with

the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development.

MCL 125.279 Public hearing; notice; affidavit of mailing.

Sec. 9. (1) Before submitting its recommendations of a tentative zoning ordinance to the township, the township zoning board shall hold at least 1 public hearing. Notice of the hearing shall be given by 2 publications in a newspaper of general circulation in the township. The first publication shall be printed not more than 30 days and not less than 20 days and the second not more than 8 days before the date of the hearing.

(2) Not less than 20 days' notice of the time and place of the hearing shall also be given by mail to each electric, gas, pipeline, and telephone public utility company, each railroad operating within the district or zone affected, and the airport manager of each airport, that registers its name and mailing address with the township zoning commission for the purpose of receiving the notice.

(3) An affidavit of mailing shall be maintained. The notices shall include the places and times at which the tentative text and any maps of the zoning ordinance may

be examined.

MCL 125.280 Submission of proposed zoning ordinance for approval; composition and purpose of coordinating zoning committee; presumption; waiver.

Sec. 10. Following the hearing, the township zoning board shall submit the proposed zoning ordinance including any zoning maps to the county zoning commission of the county in which the township is situated for review and recommendation if a commission has been appointed, as provided by Act No. 183 of the Public Acts of 1943, as amended, being sections 125.201 to 125.232 of the Michigan Compiled Laws, and is functioning in the county, or to the county planning commission appointed as provided by Act No. 282 of the Public Acts of 1945, as amended, being sections 125.101 to 125.107 of the Michigan Compiled Laws, or, by resolution of the county board of commissioners, to the coordinating zoning committee of the county. If there is not a county zoning commission or county planning commission, the proposed zoning ordinance, including any zoning maps, shall be submitted to the coordinating zoning committee. The coordinating zoning committee shall be composed of either 3 or 5 members appointed by the county board of commissioners for the purpose of coordinating the zoning ordinances proposed for adoption under this act with the zoning ordinances of a township, city, or incorporated village having a common boundary with the township. If the recommendation of the county zoning commission, planning commission, or coordinating zoning committee has not been received by

the township within 30 days after receipt of the ordinance by the county, it shall be conclusively presumed that the county has waived its right for review and recommendation of the ordinance. The county board of commissioners of a county by resolution may waive the county review of township ordinances and amendments required by this section.

MCL 125.281 Transmitting summary of comments and proposed zoning plan and text to township board; additional hearings; notice; report on amendments; adoption and effective date of zoning ordinance.

Sec. 11. The township zoning board shall transmit a summary of comments received at the public hearing and its proposed zoning plan and text to the township board. The township board may hold additional hearings if the township board considers it necessary. Notice of a public hearing held by the township board shall be published in a newspaper which circulates in the township. The notice shall be published not more than 15 days nor less than 5 days before the hearing. If the township board considers amendments to the proposed text, or a zoning ordinance, advisable, the township board shall refer the amendments to the zoning board for a report thereon within a time specified by the township board. After receiving the report, the township board shall grant a hearing on a proposed ordinance provision to a property owner who by certified mail addressed to the clerk of the township board requests a hearing and the township board shall request the zoning board to attend the hearing. After a hearing at a regular meeting or at a

special meeting called for that purpose, the township board may adopt, by majority vote of its membership, pursuant to this act, a zoning ordinance for the portions of the township outside the limits of cities and villages, with or without amendments that have been previously considered by the zoning board or at a hearing. Subject to section 12, the ordinance shall take effect upon the expiration of 7 days after publication under section 11a or at such later date after publication as may be specified by the township board.

MCL 125.281a Filing zoning ordinance with amendments or supplements; publication and contents of notice of ordinance adoption.

Sec. 11a. (1) The zoning ordinance or subsequent amendments or supplements shall be filed with the township clerk, and 1 notice of ordinance adoption shall be published in a newspaper of general circulation in the township within 15 days after adoption. Promptly following adoption of a zoning ordinance or subsequent amendment by the township board, a copy of the notice of adoption shall also be mailed to the airport manager of an airport entitled to notice under section 9(2).

(2) The notice of ordinance adoption under subsection (1) shall include the following information:

(a) In the case of a newly adopted zoning ordinance, the following statement:

"A zoning ordinance regulating the development and use of land has been

adopted by the township board of the township of _____".

(b) In the case of an amendment to an existing zoning ordinance, either a summary of the regulatory effect of the amendment, including the geographic area affected, or the text of the amendment.

(c) The effective date of the ordinance.

(d) The place where and time when a copy of the ordinance may be purchased or inspected.

MCL 125.282 Filing petition for submission of ordinance to electors.

Sec. 12. Within 7 days after publication of a zoning ordinance under section 11a, a registered elector residing in the portion of the township outside the limits of cities and villages may file with the township clerk a notice of intent to file a petition under this section. If a notice of intent is filed, then within 30 days following the publication of the zoning ordinance, a petition signed by a number of registered electors residing in the portion of the township outside the limits of cities and villages equal to not less than 10% of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, in the township may be filed with the township clerk requesting the submission of an ordinance or part of an ordinance to the electors residing in the portion of the township outside the limits of cities and villages for their approval. Upon

the filing of a notice of intent, the ordinance or part of the ordinance adopted by the township board shall not take effect until 1 of the following occurs:

(a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.

(b) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is inadequate.

(c) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the portion of the township outside the limits of cities and villages voting thereon at the next regular election which supplies reasonable time for proper notices and printing of ballots, or at any special election called for that purpose. The township board shall provide the manner of submitting an ordinance or part of an ordinance to the electors for their approval or rejection, and determining the result of the election.

MCL 125.284 Amendments or supplements to zoning ordinance; notice of proposed rezoning; adoption of amendment conforming to court decree; notice of adopted amendment.

Sec. 14. Amendments or supplements to the zoning ordinance may be made in the same manner as provided in this act for the enactment of the original ordinance. If

an individual property or several adjacent properties are proposed for rezoning, the township zoning board shall give a notice of the proposed rezoning to the owner of the property in question, to all persons to whom any real property within 300 feet of the premises in question is assessed, and to the occupants of all single and 2-family dwellings within 300 feet. The notice shall be delivered personally or by mail to the respective owners and tenants at the address given in the last assessment roll. If the tenant's name is not known, the term "occupant" may be used. If the notice is delivered by mail, an affidavit of mailing shall be filed with the zoning board before the hearing. The notice shall be made not less than 8 days before the hearing provided by section 9 stating the time, place, date, and purpose of the hearing. An amendment for the purpose of conforming a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the township board and the notice of the adopted amendment published without referring the amendment to any other board or agency provided for in this act.

MCL 125.286 Nonconforming uses.

Sec. 16. (1) The lawful use of a dwelling, building, or structure and of land or a premise as existing and lawful at the time of enactment of a zoning ordinance, or, in the case of an amendment of an ordinance, then at the time of the amendment, may be continued although the use does not conform with the ordinance or amendment.

(2) The township board shall provide in a zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon reasonable terms set forth in the zoning ordinance. In establishing terms for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses different classes of nonconforming uses may be established in the ordinance with different requirements applicable to each class.

(3) A township may acquire, by purchase, condemnation, or otherwise private property or an interest in private property for the removal of nonconforming uses. The cost and expense, or a portion thereof, of acquiring the private property may be paid from general funds or assessed to a special district in accordance with the applicable statutory provisions relating to the creation and operation of special assessment districts for public improvements in townships. The elimination of the nonconforming uses and structures in a zoning district is declared to be for a public purpose and for a public use. The township board may institute and prosecute proceedings for condemnation of nonconforming uses and structures under the power of eminent domain in accordance with Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws or other applicable statute.

MCL 125.286b Special land uses.

Sec. 16b. (1) A township may provide in a zoning

ordinance for special land uses which shall be permitted in a zoning district only after review and approval by either the zoning board, an official charged with administering the ordinance, or the township board, as specified in the ordinance. The ordinance shall specify:

(a) The special land uses and activities eligible for approval consideration and the body or official charged with reviewing special land uses and granting approval.

(b) The requirements and standards upon which decisions on requests for special land use approval shall be based.

(c) The procedures and supporting materials required for application, review, and approval.

(2) Upon receipt of an application for a special land use which requires a decision on discretionary grounds, 1 notice that a request for special land use approval has been received shall be published in a newspaper which circulates in the township, and sent by mail or personal delivery to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet. The notice shall be given not less than 5 nor more than 15 days before the date the application will be considered. If the name of the occupant is not known, the term "occupant" may be used in making notification. Notification need not be given to more than 1 occupant of a structure, except that if a structure contains more

than 1 dwelling unit or spatial area owned or leased by different individuals, partnerships, businesses, or organizations, 1 occupant of each unit or spatial area shall receive notice. In the case of a single structure containing more than 4 dwelling units or other distinct spatial areas owned or leased by different individuals, partnerships, businesses, or organizations, notice may be given to the manager or owner of the structure who shall be requested to post the notice at the primary entrance to the structure. The notice shall:

(a) Describe the nature of the special land use request.

(b) Indicate the property which is the subject of the special land use request.

(c) State when and where the special land use request will be considered.

(d) Indicate when and where written comments will be received concerning the request.

(e) Indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the boundary of the property being considered for a special use.

(3) At the initiative of the body or official responsible for approving special land uses, or upon the request of the applicant for special land use authorization or a property owner or the occupant of a structure located within 300

feet of the boundary of the property being considered for a special land use, a public hearing with notification as required for a notice of a request for special land use approval, as provided in subsection (2), shall be held before a decision is made on the special land use request which is based on discretionary grounds. If the applicant or the body or official responsible for approving special land uses requests a public hearing, only notification of the public hearing need be made. A decision on a special land use which is based on discretionary grounds, shall not be made unless notification of the request for special land use approval, or notification of a public hearing on a special land use request has been made as required by this section.

(4) The body or official designated in the zoning ordinance to review and approve special land uses may deny, approve, or approve with conditions, a request for special land use approval. The decision on a special land use shall be incorporated in a statement containing the conclusions relative to the special land use under consideration which specifies the basis for the decision, and any conditions imposed.

MCL 125.286c Planned unit development.

Sec. 16c. (1) As used in this section, "planned unit development" includes such terms as cluster zoning, planned development, community unit plan, planned residential development, and other terminology denoting zoning requirements designed to accomplish the objectives of the zoning ordinance through a land

development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.

(2) A township may establish planned unit development requirements in a zoning ordinance which permit flexibility in the regulation of land development; encourage innovation in land use and variety in design, layout, and type of structures constructed; achieve economy and efficiency in the use of land, natural resources, energy, and the provision of public services and utilities; encourage useful open space; and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of this state. The review and approval of planned unit developments shall be by either the zoning board, an official charged with administration of the ordinance, or the township board, as specified in the ordinance.

(3) Within a land development project designated as a planned unit development, regulations relating to the use of land, including permitted uses, lot sizes, setbacks, height limits, required facilities, buffers, open space areas, and land use density, shall be determined in accordance with the planned unit development regulations specified in the zoning ordinance. The planned unit development regulations need not be uniform with regard to each type of land use if equitable procedures recognizing due process principles and avoiding arbitrary decisions have been followed in making regulatory decisions.

(4) The planned unit development regulations established by a township shall specify:

(a) The body or official which will review and approve planned unit development requests.

(b) The conditions which create planned unit development eligibility, the participants in the review process, and the requirements and standards upon which applications will be judged and approval granted.

(c) The procedures required for application, review, and approval.

(5) Following receipt of a request to approve a planned unit development, the body or official charged in the ordinance with review and approval of planned unit developments shall hold at least 1 public hearing on the request. An ordinance may provide for preapplication conferences before submission of a planned unit development request, and the submission of preliminary site plans before the public hearing. Notification of the public hearing shall be given in the same manner as required by section 16b(3) for public hearings on special land uses. Within a reasonable time following the public hearing, the body or official responsible for approving planned unit developments shall meet for final consideration of the request, and deny, approve, or approve with conditions, the request. The body or official shall prepare a report stating its conclusions on the request for a planned unit development, the basis for its decision, the decision, and any conditions relating to

an affirmative decision. If the ordinance requires that the township board amends the ordinance to act on the planned unit development request, the zoning board shall hold the hearing as required by section 9, and the report and the documents related to the planned unit development request shall be transmitted to the township board for consideration in making a final decision. If amendment of a zoning ordinance is required by the planned unit development regulations of a township zoning ordinance, the requirements of this act for amendment of a zoning ordinance shall be followed, except that the hearing and notice required by this subsection shall be regarded as fulfilling the public hearing and notice requirement of section 9.

(6) If the planned unit development regulations of a township zoning ordinance do not require amendment of the ordinance to authorize a planned unit development, the body or official charged in the zoning ordinance with review and approval of planned unit developments may approve, approve with conditions, or deny a request.

(7) Final approvals may be granted on each phase of a multiphased planned unit development if each phase contains the necessary components to insure protection of natural resources and the health, safety, and welfare of the users of the planned unit development and the residents of the surrounding area.

(8) In establishing planned unit development requirements, a township may, when available and applicable, incorporate by reference other ordinances or

statutes which regulate land development. The planned unit development regulations contained in zoning ordinances shall encourage complementary relationships between zoning regulations and other regulations affecting the development of land.

MCL 125.286d Discretionary decisions; requirements, standards, and conditions.

Sec. 16d. (1) If a township zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments pursuant to section 16b or 16c, or otherwise provides for discretionary decisions, the requirements and standards upon which the decisions are made shall be specified in the ordinance. The standards shall be consistent with, and promote the intent and purpose of the zoning ordinance, and shall insure that the land use or activity authorized shall be compatible with adjacent uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards shall also insure that the land use or activity is consistent with the public health, safety, and welfare of the township. A request for approval of a land use or activity which is in compliance with the standards stated in the zoning ordinance, the conditions imposed pursuant to the ordinance, other applicable ordinances, and state and federal statutes, shall be approved.

(2) Reasonable conditions may be required with the approval of a special land use, planned unit development, or other land uses or activities permitted

by discretionary decision. The conditions may include conditions necessary to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Conditions imposed shall meet all of the following requirements:

(a) Be designed to protect natural resources, the health, safety, and welfare and the social and economic well being of those who will use the land use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.

(b) Be related to the valid exercise of the police power, and purposes which are affected by the proposed use or activity.

(c) Be necessary to meet the intent and purpose of the zoning ordinance, be related to the standards established in the ordinance for the land use or activity under consideration, and be necessary to insure compliance with those standards.

(3) The conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action, and shall remain unchanged except upon the mutual consent of the approving authority and

the landowner. The approving authority shall maintain a record of conditions which are changed.

MCL 125.286e Site plan.

Sec. 16e. (1) As used in this section, "site plan" includes the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.

(2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

(3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the individual or body which initially approved the site plan.

(4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon

requirements and standards contained in the zoning ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(6) The purpose of this amendatory act is to clarify the authority of the township body, board, or official charged with reviewing site plans and granting approval of site plans, which is implied from the language of this act, but which is not specifically set forth in this act.

MCL 125.288 Township board of appeals; selection, qualifications, and terms of members; chairperson; per diem or expenses; removal; conflict of interest; misconduct in office; vacancies; majority required to conduct business.

Sec. 18. (1) In each township in which the township board exercises the authority conferred by this act, it shall appoint a township board of appeals. In a township having a population of 5,000 or more persons, the board of appeals shall be composed of not less than 5 regular members. In a township having a population of less than 5,000 persons, the board of appeals shall be composed of not less than 3 regular members. The precise number of regular members comprising the board of appeals shall

be specified by the township board in the zoning ordinance. The first regular member of the board of appeals shall be a member of the township zoning board. In a township where the powers, duties, and responsibilities of the zoning board are transferred to the planning commission pursuant to section 11 of Act No. 168 of the Public Acts of 1959, as amended, being section 125.331 of the Michigan Compiled Laws, the first regular member of the board of appeals shall be a member of the township planning commission. The remaining regular members and any alternate members of the board of appeals shall be selected from the electors of the township residing outside of incorporated cities and villages. The members selected shall be representative of the population distribution and of the various interests present in the township. One regular member may be a member of the township board. An elected officer of the township shall not serve as chairperson of the board of appeals. An employee or contractor of the township board may not serve as a member of the township board of appeals.

(2) A township board may appoint not more than 2 alternate members for the same term as regular members to the zoning board of appeals. An alternate member may be called as specified in the zoning ordinance to serve as a regular member of the zoning board of appeals in the absence of a regular member if the regular member is absent from or will be unable to attend 2 or more consecutive meetings of the zoning board of appeals or is absent from or will be unable to attend meetings for a period of more than 30 consecutive days. An alternate

member may also be called to serve as a regular member for the purpose of reaching a decision on a case in which the regular member has abstained for reasons of conflict of interest. The alternate member appointed shall serve in the case until a final decision is made. The alternate member has the same voting rights as a regular member of the zoning board of appeals.

(3) The total amount annually allowed the board of appeals as per diem or as expenses actually incurred in the discharge of duties shall not exceed a reasonable sum, which shall be appropriated annually in advance by the township board.

(4) A member of the board of appeals may be removed by the township board for nonperformance of duty or misconduct in office upon written charges and after public hearing. A member shall disqualify himself or herself from a vote in which the member has a conflict of interest. Failure of a member to disqualify himself or herself from a vote in which the member has a conflict of interest constitutes misconduct in office.

(5) Terms shall be for 3 years, except for members serving because of their membership on the zoning board, planning commission, or township board, whose terms shall be limited to the time they are members of the zoning board, planning commission, or township board, respectively, and the period stated in the resolution appointing them. When members are first appointed, the appointments may be for less than 3 years to provide for staggered terms. A successor shall be appointed not

more than 1 month after the term of the preceding member has expired. Vacancies for unexpired terms shall be filled for the remainder of the term.

(6) A township board of appeals shall not conduct business unless a majority of the regular members of the board is present.

MCL 125.289 Board of appeals; meetings, open to public, record of proceedings.

Sec. 19. Meetings of the township board of appeals shall be held at the call of the chairman and at such other times as the board in its rules of procedure may specify. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board of appeals shall be open to the public. The board shall maintain a record of its proceedings which shall be filed in the office of the township clerk and shall be a public record.

MCL 125.290 Township board of appeals; duties; variance.

Sec. 20. (1) The township board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps, and may adopt rules to govern its procedures sitting as a board of appeals. It shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official or body charged with enforcement of an

ordinance adopted pursuant to this act. It shall hear and decide matters referred to it or upon which it is required to pass under an ordinance adopted pursuant to this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

(2) The concurring vote of a majority of the members of the township board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, or to decide in favor of the applicant any matter upon which the board is required to pass under the ordinance, or to grant a variance in the ordinance. An appeal may be taken by a person aggrieved or by an officer, department, board, or bureau of the township, county, or state. In addition, a variance in the ordinance may be applied for and granted pursuant to section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and this act. The township zoning board of appeals shall state the grounds of each determination.

MCL 125.291 Board of appeals; appeals.

Sec. 21. Such appeal shall be taken within such time as shall be prescribed by the township board of appeals by general rule, by the filing with the officer from whom the appeal is taken and with the board of appeals of a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

MCL 125.292 Board of appeals; restraining order.

Sec. 22. An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the township board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

MCL 125.293 Township board of appeals; appeals.

Sec. 23. The township board of appeals shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide the appeal within a reasonable time. At the hearing, a party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal was taken and may issue or direct the issuance of a permit. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and

substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to section 16d(2).

MCL 125.293a Township board of appeals; decision final; judicial review.

Sec. 23a. (1) The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:

(a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings,

or may affirm its original decision. The supplementary record and decision shall be filed with the court.

(3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

MCL 125.294 Violation as nuisance per se; abatement; liability; administration and enforcement of ordinance; penalties.

Sec. 24. A use of land, or a dwelling, building, or structure including a tent or trailer coach, used, erected, altered, razed, or converted in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated and the owner or agent in charge of the dwelling, building, structure, tent, trailer coach, or land is liable for maintaining a nuisance per se. The township board shall in the ordinance enacted under this act designate the proper official or officials who shall administer and enforce that ordinance and do either of the following for each violation of the ordinance:

(a) Impose a penalty for the violation.

(b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

MICHIGAN RIGHT TO FARM ACT

MCL 286.471 Short title.

Sec. 1. This act shall be known and may be cited as the "Michigan right to farm act".

MCL 286.472 Definitions.

Sec. 2. As used in this act:

(a) "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

(b) "Farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:

(i) Marketing produce at roadside stands or farm markets.

(ii) The generation of noise, odors, dust, fumes, and other associated conditions.

(iii) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm

grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(iv) Field preparation and ground and aerial seeding and spraying.

(v) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.

(vi) Use of alternative pest management techniques.

(vii) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.

(viii) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.

(ix) The conversion from a farm operation activity to other farm operation activities.

(x) The employment and use of labor.

(c) "Farm product" means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy

products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

(d) "Generally accepted agricultural and management practices" means those practices as defined by the Michigan commission of agriculture. The commission shall give due consideration to available Michigan department of agriculture information and written recommendations from the Michigan state university college of agriculture and natural resources extension and the agricultural experiment station in cooperation with the United States department of agriculture natural resources conservation service and the consolidated farm service agency, the Michigan department of natural resources, and other professional and industry organizations.

(e) "Person" means an individual, corporation, partnership, association, or other legal entity.

MCL 286.473 Farm or farm operation as public or private nuisance; review and revision of practices; finding; conditions.

Sec. 3. (1) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm

operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

(2) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

(3) A farm or farm operation that is in conformance with subsection (1) shall not be found to be a public or private nuisance as a result of any of the following:

(a) A change in ownership or size.

(b) Temporary cessation or interruption of farming.

(c) Enrollment in governmental programs.

(d) Adoption of new technology.

(e) A change in type of farm product being produced.

MCL 286.473b Recovery of costs and expenses.

Sec. 3b. In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees.

MCL 286.473c Property subject to disclosure; contents of statement.

Sec. 3c. (1) Certain real property is subject to those disclosures described in section 7 of the seller disclosure act, Act No. 92 of the Public Acts of 1993, being section 565.957 of the Michigan Compiled Laws. A seller of real property located within 1 mile of the property boundary of a farm or farm operation may voluntarily make available to the buyer the following statement:

> "This notice is to inform prospective residents that the real property they are about to acquire lies within 1 mile of the property boundary of a farm or farm operation. Generally accepted agricultural and management practices may be utilized by the farm or farm operation and may generate usual and ordinary noise, dust, odors, and other associated conditions, and these practices are protected by the Michigan right to farm act."

(2) Certain subdivided land is subject to those disclosures described in section 8 of the land sales act, Act No. 286 of the Public Acts of 1972, being section 565.808 of the Michigan Compiled Laws.

MCL 286.474 Investigation of complaints involving farm or farm operation; memorandum of understanding; generally accepted agricultural and management practices; unverified complaints; applicability of other statutes; preemption of local ordinance, regulation, or resolution; ordinance proposed by local unit of government; generally accepted agricultural and management practices for site selection and odor controls at new or expanding animal livestock facilities; advisory committee; manure management plan; duties of department; definitions.

Sec. 4. (1) Subject to subsection (2), the director shall investigate all complaints involving a farm or farm operation, including, but not limited to, complaints involving the use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air pollution, surface water or groundwater pollution, food and agricultural processing by-products, care of farm animals and pest infestations. Within 7 business days of receipt of the complaint, the director shall conduct an on-site inspection of the farm or farm operation. The director shall notify, in writing, the city, village, or township and the county in which the farm or farm operation is located of the complaint.

(2) The commission and the director shall enter into a

memorandum of understanding with the director of the department of environmental quality. The investigation and resolution of environmental complaints concerning farms or farm operations shall be conducted in accordance with the memorandum of understanding. However, the director shall notify the department of environmental quality of any potential violation of the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, or a rule promulgated under that act. Activities at a farm or farm operation are subject to applicable provisions of the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, and the rules promulgated under that act. The commission and the director shall develop procedures for the investigation and resolution for other farm-related complaints.

(3) If the director finds upon investigation under subsection (1) that the person responsible for a farm or farm operation is using generally accepted agricultural and management practices, the director shall notify, in writing, that person, the complainant, and the city, village, or township and the county in which the farm or farm operation is located of this finding. If the director identifies that the source or potential sources of the problem were caused by the use of other than generally accepted agricultural and management practices, the director shall advise the person responsible for the farm or farm operation that necessary changes should be made to resolve or abate the problem and to conform with generally accepted agricultural and management practices and that if those changes cannot be

implemented within 30 days, the person responsible for the farm or farm operation shall submit to the director an implementation plan including a schedule for completion of the necessary changes. When the director conducts a follow-up on-site inspection to verify whether those changes have been implemented, the director shall notify, in writing, the city, village, or township and the county in which the farm or farm operation is located of the time and date of the follow-up on-site inspection and shall allow a representative of the city, village, or township and the county to be present during the follow-up on-site inspection. If the changes have been implemented, the director shall notify, in writing, the person responsible for the farm or farm operation, the complainant, and the city, village, or township and the county in which the farm or farm operation is located of this determination. If the changes have not been implemented, the director shall notify, in writing, the complainant and the city, village, or township and the county in which the farm or farm operation is located that the changes have not been implemented and whether a plan for implementation has been submitted. Upon request, the director shall provide a copy of the implementation plan to the city, village, or township and the county in which the farm or farm operation is located.

(4) A complainant who brings more than 3 unverified complaints against the same farm or farm operation within 3 years may be ordered, by the director, to pay to the department the full costs of investigation of any fourth or subsequent unverified complaint against the same farm or farm operation. As used in this subsection,

"unverified complaint" means a complaint in response to which the director determines that the farm or farm operation is using generally accepted agricultural and management practices.

(5) Except as provided in subsection (6), this act does not affect the application of state statutes and federal statutes.

(6) Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

(7) A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. A proposed ordinance under this subsection shall not conflict with existing state laws or federal laws. At least 45 days prior to enactment of the proposed ordinance, the local unit of government shall submit a copy of the proposed ordinance to the director. Upon receipt of the proposed ordinance, the director shall hold a public meeting in that local unit of

government to review the proposed ordinance. In conducting its review, the director shall consult with the departments of environmental quality and community health and shall consider any recommendations of the county health department of the county where the adverse effects on the environment or public health will allegedly exist. Within 30 days after the public meeting, the director shall make a recommendation to the commission on whether the ordinance should be approved. An ordinance enacted under this subsection shall not be enforced by a local unit of government until approved by the commission of agriculture.

(8) By May 1, 2000, the commission shall issue proposed generally accepted agricultural and management practices for site selection and odor controls at new and expanding animal livestock facilities. The commission shall adopt such generally accepted agricultural and management practices by June 1, 2000. In developing these generally accepted agricultural and management practices, the commission shall do both of the following:

(a) Establish an advisory committee to provide recommendations to the commission. The advisory committee shall include the entities listed in section 2(d), 2 individuals representing townships, 1 individual representing counties, and 2 individuals representing agricultural industry organizations.

(b) For the generally accepted agricultural and management practices for site selection, consider groundwater protection, soil permeability, and other

factors determined necessary or appropriate by the commission.

(9) If generally accepted agricultural and management practices require the person responsible for the operation of a farm or farm operation to prepare a manure management plan, the person responsible for the operation of the farm or farm operation shall provide a copy of that manure management plan to the city, village, or township or the county in which the farm or farm operation is located, upon request. A manure management plan provided under this subsection is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(10) The department shall do all of the following:

(a) Annually submit to the standing committees of the senate and house of representatives with jurisdiction over issues pertaining to agriculture and local government a report on the implementation of this act.

(b) Make available on the department's website current generally accepted agricultural and management practices.

(c) Establish a toll-free telephone number for receipt of information on noncompliance with generally accepted agricultural and management practices.

(11) As used in this section:

(a) "Adverse effects on the environment or public health" means any unreasonable risk to human beings or the environment, based on scientific evidence and taking into account the economic, social, and environmental costs and benefits and specific populations whose health may be adversely affected.

(b) "Commission" means the commission of agriculture.

(c) "Department" means the department of agriculture.

(d) "Director" means the director of the department or his or her designee.

ALLENDALE CHARTER TOWNSHIP
ZONING ORDINANCE

Volume Two of the Allendale Township Code

Updated through April 14, 1996

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ARTICLE 2
PURPOSE, SCOPE AND INTERPRETATION

Sec. 2.01. PURPOSE.

This ordinance shall affect the use and occupancy of all land and every building in the Charter Township. This ordinance has been made in accordance with a Land Use Plan and is designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewers, schools, parks and other public requirements. These regulations have been made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, with a view to conserving property values, encouraging the most appropriate use of land and to be in keeping with the general trend and character of population and building development.

Sec. 2.02 SCOPE AND INTERPRETATION.

It is not intended by this ordinance to repeal, abrogate, annul or in any way impair or interfere with existing provisions of other laws or ordinances, except those specifically repealed by this ordinance, or of any private restrictions placed upon property by covenant, deed or other private agreement. Where this ordinance

imposes a greater restriction upon the use of buildings or premises or upon the height of buildings or lot coverage, or requires greater lot areas, or larger yards, courts or other open spaces than are imposed or required by such existing provisions of law or ordinance or by such rules, regulations, or permits or by such private restrictions, the provisions of this ordinance shall control.

ARTICLE 3
GENERAL PROVISIONS

* * *

Sec. 3.09. CONTROL OF HEAT, GLARE, FUMES, DUST, NOISE, VIBRATION AND ODORS.

Every use shall be so maintained, conducted or operated that it is not obnoxious or dangerous by reason of heat, glare, fumes, odors, dust, noise or vibration beyond any boundary line of the lot or parcel of land on which the use is located.

* * *

Sec. 3.12. PRINCIPAL BUILDING ON A LOT.

In all districts not more than one (1) principal building or use shall be placed on a lot of record, except, in the case of multiple family housing developments, or commercial, institutional, or industrial developments where the Planning Commission may determine that a group of buildings collectively constitutes a principal use. In addition, agricultural buildings shall collectively be

considered to be one principal use.

* * *

Sec. 3.14 CONDOMINIUM PROJECT APPROVAL.

Pursuant to authority conferred by Section 141 of the Condominium Act, Act 59 of 1978, (MCL 559.101 et. seq.) as amended, all condominium subdivision plans must be approved by the Planning Commission. In determining whether to approve a condominium subdivision plan, the Planning Commission shall consult with the Zoning Administrator, Township Attorney, and Township Engineer regarding the adequacy of the master deed, deed restrictions, utility systems and streets, subdivision layout and design, and compliance with all requirement of the Condominium Act.

A. Initial Information. Concurrently with notice required to be given the Charter Township of Allendale pursuant to Section 71 of Public Act 59of 1978, as amended, (MCL 559.171) a person, firm or corporation intending to develop a condominium project shall provide the following information with respect to the project:

1. The name, address and telephone number of:

a. All persons, firms or corporations with an ownership interest in the land on which the condominium project will be located together with a description of the nature of each entity's interest (for example, fee owner, optionee, or land contract vendee).

b. All engineers, attorneys, architects or registered land surveyors associated with the project.

c. The developer or proprietor of the condominium project.

2. The legal description of the land on which the condominium project will be developed together with appropriate tax identification numbers.

3. The acreage content of the land on which the condominium project will be developed.

4. The purpose of the project (for example, residential, commercial, industrial, etc.).

5. Approximate number of condominium units to be developed on the subject parcel.

6. Whether or not a community water system is contemplated.

7. Whether or not a community septic system is contemplated.

B. Information to be Kept Current. The information shall be furnished to the Zoning Administrator and shall be kept updated until such time as a Certificate of Compliance has been issued pursuant to Section 27.06 hereof.

C. Site Plans - New Projects, Master Deed, and Engineering and Inspections. Prior to recording of the Master Deed required by Section 72 of Public Act 59 of 1978, as amended (MCL 559.108), the condominium project shall undergo site plan review and approval pursuant to Article 24 of this Ordinance. In addition, the Township shall require appropriate engineering plans and inspections prior to the issuance of any Certificates of Compliance.

D. Site Plans - Expandable or Convertible Projects. Prior to expansion or conversion of a

condominium project to additional land the new phase of the project shall undergo site plan review and approval pursuant to Article 24 of this Ordinance.

E. Master Deed, Restrictive Covenants and "As Built" Survey to be Furnished. The Condominium project developer or proprietor shall furnish the Zoning Administrator with the following: One (1) copy of the recorded Master Deed, one (1) copy of all restrictive covenants and two (2) copies of an "as built survey". The "as built survey" shall be reviewed by the Zoning Administrator for compliance with Township Ordinances. Fees for this review shall be established by resolution of the Township Board.

F. Compliance with Federal, State and Local Law. All condominium projects shall comply with Federal and State Statues and local ordinances.

G. State and County Approval. The developer or proprietor of the condominium project shall establish that appropriate state and county approvals have been received with regard to the fresh water system for the proposed project and with regard to the waste water disposal system for the proposed project.

H. Easements for Utilities. The condominium subdivision plan shall include all necessary easements granted to Allendale Township, or Ottawa County if appropriate, for the purposes of constructing, operating, inspecting, maintaining, repairing, altering, replacing, and/or removing pipelines, mains, conduits and other installations

of a similar character (hereinafter collectively called "public structures") for the purpose of providing public utilities, including conveyance of sewage, water and storm water run-off across, through and under the property subject to said easement, and excavating and refilling ditches and trenches necessary for the location of said structures.

I. Condominium Plan - Required Content. All condominium subdivision plans shall include the information required by Section 66 of the Condominium Act and the following:

1. A survey plan of the condominium subdivision
2. A flood plain plan, when appropriate.
3. A site plan showing the location, size, shape, area and width of all condominium units.
4. A utility plan showing all sanitary sewer, water, and storm sewer lines and easements granted to the Township for installation, repair and maintenance of all utilities.
5. A street construction, paving, and maintenance plan for all private streets within the proposed condominium subdivision.
6. A storm drainage and stormwater management plan, including all lines, swales, drains, basins, and other facilities.

J. Relocation of Boundaries. The relocation of boundaries, as described in Section 48 of the Condominium Act, shall conform to all setback requirements of this Ordinance for the district in which the project is located, shall be approved by the Zoning Administrator, and this requirement

shall be made part of the bylaws and recorded as part of the master deed.

K. Subdivision of Condominium Units. All subdivisions of individual condominium units shall conform to the requirements of this Ordinance for minimum lot width, lot area, and the building setback requirements, shall be approved by the Zoning Administrator, and these requirements shall be made part of the bylaws and recorded as part of the master deed.

L. Mobile Home Condominium Project. Mobile Home condominium projects shall conform to all requirements of this Ordinance and shall be located only in R-5 Mobile Home Park.

M. Site Condominium Projects. All Condominium projects which consist in whole or in part of condominium units which are building sites, mobile home sites or recreational sites shall provide in the condominium plan a building envelope which complies with the setback, area and width requirements of the applicable zoning district.

N. Single Family Detached Condominiums. Single family detached condominiums shall be subject to all requirements and standards of the applicable residential district regulations including minimum floor area requirements. There shall be maintained a minimum distance of eighty (80) feet from the center of one (1) residential dwelling unit to the center of another residential dwelling unit. This eighty (80) foot requirement shall be computed along the front building line. In

addition, building envelopes shall be depicted on the site plan to assure that the minimum area requirements can be met.

O. Streets and Roads. All streets and roads in a site condominium project shall, at a minimum, conform to the standards and specifications promulgated by the Ottawa County Road Commission. Or private roads built to Allendale Township Private Road Standards. (See Article 23 Sec. 23.12)

* * *

ARTICLE 5
AG AGRICULTURAL AND RURAL DISTRICT

Sec. 5.01 DESCRIPTION AND PURPOSE.

This zone is intended for tracts of land within the township that are best suited and located for agricultural production and related operations. If development or the dividing of land are to occur, they should be preceded by proper planning and rezoning. The purpose of this district is also to provide sites for single family residential development where a rural atmosphere is to be maintained. Lands within this district may also be used for recreational purposes. A low intensity of uses must be maintained since it is not expected that lands within this district will be served with complete municipal services at any point in the foreseeable future.

Sec. 5.02 PERMITTED USES.

Land or buildings in the AG District may be used

for the following purposes only:

A. Farms for both general and specialized farm operations, including the following agricultural activities:

1. crop production, including berry farms, row crops, orchards, field crops, grain, hay, pasturelands and vineyards.
2. commercial animal raising, including kennels, rabbit farms, fur bearing animal ranches, hog farms, dairy farms and cattle farms.
3. farm buildings designed and constructed to store implements, hay, grain, poultry, livestock, or other horticultural products.
4. wholesale nurseries, including tree or sod farm and greenhouses.
5. egg hatcheries.
6. confined animal feeding operations and intensive animal raising.

B. One single family residence on each lot.

C. Conservation area for flora or fauna, forest preserve, game refuge.

D. Parks or recreation areas owned or operated by a government agency.

E Permitted Accessory Uses.

1. Uses customarily accessory to farm operations.
2. Permitted accessory uses and buildings, as regulated in Section 3.11.
3. Home occupation as an accessory to a permitted use, as regulated in Section 23.07.

F. Adult foster care small group home, licensed under Act 218 of the Public Acts of 1979, as regulated in Section 23.11.

Sec. 5.03 USES REQUIRING SPECIAL APPROVAL.

The following uses may be authorized by the Planning Commission, subject to compliance with the procedures and standards established for special use permits in Article 20 of this ordinance:

A. Agricultural related service establishments.
B. Agricultural labor housing.
C. Two family dwellings.
D. Radio and television broadcasting buildings and towers.
E. Removal and processing of top soil, sand, gravel, or other minerals - see Sec. 23.08.
F. Recreational vehicle storage yard - see Sec. 23.13.
G. Churches, synagogues and other buildings used for religious worship.
H. Schools and colleges, government buildings - see Sec. 23.05.
I. Golf courses, country clubs, athletic grounds, parks - see Sec. 23.10.
N. Marinas - see Sec. 23.10B.
O. Airfields, heliports, and landing strips.
P. Campgrounds.
Q. Guest or dude ranches, riding stables
R Race Tracks.
S. Hunting clubs, wildlife refuges, shooting ranges.
T. (Reserved)

Sec. 5.05 HEIGHT REGULATIONS.

No building shall exceed thirty (30) feet in height. Farm buildings and TV and radio broadcasting towers shall be permitted at their usual and customary heights.

Sec. 5.06 AREA REGULATIONS.

All buildings, structures or additions thereto shall comply with the following requirements:

A. FRONT YARD. The uniform setback provisions of Section 3.03B shall apply to all residential buildings, structures, and additions. If a uniform setback does not exist, the front yard setback shall be not less than forty (40) feet.

B. SIDE YARD. For residential buildings, there shall be total side yards of not less than twenty-five (25) feet provided that no yard shall be less than ten (10) feet.

C. REAR YARD. There shall be a rear yard of not less than fifty (50) feet.

D. LOT AREA AND WIDTH. The minimum lot area shall not be less than on (1) acre and the width of the lot at the front setback line shall be not less than one hundred fifty (150) feet. Any lot in existence at the time of adoption of this ordinance, may be used for one single family dwelling provided that it meets the lot area and yard requirements of the R-1A Zone.

Sec. 5.07 MINIMUM FLOOR AREA.

Each single-family dwelling in this zone shall have a minimum floor area of nine hundred sixty (960) square feet. Each dwelling unit in a two-family dwelling in this zone shall have a minimum floor area as required below:

A. One Bedroom Unit. A minimum of six hundred fifty (650) square feet per unit.

B. Two Bedroom Unit. A minimum of seven hundred fifty (750) square feet per unit.

C. Three Bedroom Unit. A minimum of nine hundred (900) square feet per unit.

D. Additional Bedrooms require one hundred (100) square feet per unit.

For a minimum of twenty-four (24) feet of the length of the structure, each dwelling unit shall have a minimum width of twenty-four (24) feet.

Sec 5.08 ADDITIONAL REGULATIONS.

A. Buildings constructed for use in connection with a confined animal feeding operation or intensive animal raising operation or buildings converted into such use which have a floor area greater than 10,000 square feet in area or additions to such buildings resulting in a building exceeding 10,000 square feet in area shall be subject to site plan review by the planning commission as provided in Article 24. In addition, such buildings shall be subject to the following requirements:

1. Such structures shall be set back 500 feet from any existing residence, except that of the confined feeding operator.
2. Such structures shall be set back 1,000 feet from any existing church, school, or public recreation area.
3. Such structures shall be set back 200 feet from any public right-of-way.
4. Such structures shall be set back 1,300 feet from any existing residential plat.

B. Manure pits, sewage lagoons and similar facilities require the approval of the Planning Commission. Such a facility shall be designed by a registered

professional engineer or by an agent of the soil conservation service, who shall certify the adequacy of the proposed facility. The Planning Commission may consult with the township engineer, the soil conservation service or other agencies before approving or denying a request. If approved, such a facility must be built, operated and maintained according to plans approved by the Planning Commission.

C. Keeping and raising animals - see Sec. 23.02.
D. Parking requirements - see Article 21.
E. Signs - see Article 22.
F. Standards for single- and two-family Dwellings - see Sec. 23.14.
G. Foster care facilities - see Sec. 23.11.
H. Roadside produce stands - see Sec. 3.09.c.11.
I. Home occupation - see Sec. 23.07.

ARTICLE 7
R-1 LOW DENSITY ONE-FAMILY RESIDENTIAL DISTRICT

Sec. 7.01. DESCRIPTION AND PURPOSE.

This is the most restricted, low-density zone, composed chiefly of low-density one-family homes on individual lots together with required recreational, religious and educational facilities. For the purposes of uniformity of development patterns while maintaining flexibility of development types, the area regulations for the zone are divided into two sub-districts.

Sec. 7.02 PERMITTED USES.

Land or building in the R-1 Zone may be used for the following purposes only:

A. One single-family dwelling on each lot.
B. Permitted accessory uses and buildings as regulated in Section 3.11.
C. Home occupation, as an accessory use, as regulated in Section 23.07.
D. Adult foster care small group home, licensed under Act 218 of the public acts of 1979, as regulated in Section 23.11.
E. Cemeteries.
F. [Reserved]

Sec. 7.03 USES REQUIRING SPECIAL APPROVAL.

The following uses may be authorized by the planning commission, subject to compliance with the procedures and standards established in Article 20 of the ordinance.

A. Elementary and secondary schools and colleges which may include on-the campus dormitories, libraries, museums, art galleries, auditoriums, gymnasiums, and similar uses. Minimum side and rear yards of fifty (50) feet are required where the property abuts any residentially zoned lot.
B. Parks, playgrounds, community centers, governmental, administration, or service buildings owned and operated by a governmental agency or a nonprofit group if found to be essential to service the neighborhood or community at this location. Minimum side and rear yards of fifty (50) feet are required where the property abuts any residentially zoned lot.

C. Churches and synagogues and other buildings used principally as places of worship, provided the building or structure is at least twenty-five (25) feet from any other residentially zoned lot. Accessory uses, including parsonages, preschool, and similar uses are also permitted. See Sec. 23.05.

D. Convalescent or nursing homes.

Sec. 7.04 HEIGHT REGULATIONS.

No building shall exceed thirty (30) feet or two and one half (2-1/2) stories in height. Detached accessory buildings shall comply with the requirements of Section 3.10.

Sec. 7.05 AREA REGULATIONS.

All buildings, structures, or additions thereto shall comply with the following area requirements:

A. R-1A District:

1. FRONT YARD. The uniform setback provisions of Section 3.03 B shall apply to all residential buildings, structures, and additions. If a uniform setback does not exist, the front yard setback shall be not less than forty (40) feet.

2. SIDE YARD. On interior lots, total side yards of twenty-five (25) feet are required; no yard shall be less than ten (10) feet. On corner lots, a side yard of forty (40) feet is required along the street side of the lot; a side yard of ten (10) feet is required on the opposite side of the lot.

3. REAR YARD. There shall be a rear yard of not less than fifty (50) feet.

4. LOT AREA AND WIDTH. The minimum lot area

of an interior lot shall not be less than fifteen thousand (15,000) square feet and the width of the lot at the front setback line shall not be less than one hundred (100) feet. A corner lot in the R-1A district shall have a minimum area of seventeen thousand five hundred (17,500) square feet and the width of the lot at the front setback line shall not be less than one hundred twenty (120) feet.

B. R-1B District:

1. FRONT YARD. The uniform setback provisions of Section 3.03B shall apply to all residential buildings, structures, and additions. If a uniform setback does not exist, the front yard setback shall be not less than thirty five (35) feet.

2. SIDE YARD. On interior lots, total side yards of twenty (20) feet are required; no yard shall be less than seven (7) feet. On corner lots, a side yard of thirty-five (35) feet is required along the street side of the lot; a side yard of seven (7) feet is required on the opposite side of the lot.

3. REAR YARD. There shall be a rear yard of not less than thirty-five (35) feet.

4. LOT AREA AND WIDTH. The minimum lot area of an interior lot shall not be less than ten thousand (10,000) square feet and the width of the lot at the front setback line shall not be less than eighty (80) feet. A corner lot in the R-1B district shall have a minimum area of twelve thousand five hundred (12,500) square feet and the width of the lot at the front setback line shall not be less than one hundred (100) feet.

Sec. 7.06 MINIMUM FLOOR AREA AND EXTERIOR WIDTH.

Each single family dwelling in this zone shall have a minimum floor area of nine hundred sixty (960) square feet. For a minimum of twenty-four (24) feet of the length of the structure, each dwelling unit shall have a minimum width of twenty-four (24) feet.

Sec. 7.07 ADDITIONAL REGULATIONS.

A. Keeping and raising animals - see Sec. 23.02.
B. Parking Requirements - see Article 21.
C. Signs - see Article 22.
D. Standards for Single Family Dwellings - see Sec. 23.14.
E. Foster and Child Care Facilities - see Sec. 3.11.
F. Accessory Buildings and Uses - see Sec. 3.11.
G. Home Occupation - see Sec. 23.07.

* * *

ARTICLE 12
PUD - PLANNED UNIT DEVELOPMENT DISTRICT

Sec. 12.01. DESCRIPTION AND PURPOSE.

The PUD District is intended to permit and control the development of preplanned areas for compatible use of land. This district may be used to develop land to enhance the environment by providing open space, preserve or provide woodlots, water frontage and active and passive recreation areas by allowing flexibility for private development. A mixture of housing and commercial uses not otherwise permitted in the

residential districts of the township are permitted in this district. The regulations contained herein provide flexibility in the placement of structures, lot sizes, and types of housing, while maintaining adequate planning and development standards.

The use, area, height, bulk, and placement regulations of this ordinance are primarily applicable to the usual situation of one (1) principal building per lot. In certain large developments these requirements result in a less desirable development for the achievement of the purposes of this ordinance than if a controlled degree of flexibility is allowed. For example, large scale residential or commercial development might better achieve the purposes of this ordinance if a portion of the open space requirements were consolidated into lots or community parks rather than on an individual, lot-for-lot basis.

A development may be of such large size as to justify permitting certain incidental uses not normally permitted in the zoning district. As an example, a multiple family development might include a coffee shop, food store, or barber shop primarily for the residents of the development and surrounding communities. Permitting these uses within the development can, in certain cases, increase convenience, be compatible with the overall character of the development and not be injurious to adjoining properties.

The Planned Unit Development (PUD) Zoning District is intended to permit and control the development of preplanned areas as Planned Unit Developments (PUD's) for various compatible uses

permitted by this ordinance in other districts and for other special uses not so permitted. In so doing, a degree of flexibility is allowed in use, area, height, bulk, and placement regulations for PUD Developments. However, it is also the intent of a PUD District to afford each type of use reasonable protection from encroachment or interference by other incompatible land uses, and that reasonable protection be afforded to uses adjacent to the PUD Zoning District.

Sec. 12.02. LEGISLATIVE FINDINGS.

It is hereby determined that through careful land use and site planning, it is sometimes possible to develop substantial tracts of land for uses and with structures and other facilities which are not fully in conformance with the provisions of this ordinance but which, nevertheless, are not harmful to the public health, safety and welfare, and which, in fact, may, through improved efficiency of land use, be beneficial thereto, and that it is in the public interest to provide regulations as an alternative to the regulations otherwise provided in this ordinance to make possible such development and use while, at the same time, assuring that any such development and use is not harmful to the public health, safety and welfare.

Sec. 12.03. PROCEDURE.

A. APPLICATION. Any area in the township may be zoned as a PUD District upon application therefore by the owners of the property in said area. Such application shall be accompanied by a preliminary plan as herein provided. Before any land is developed or improvement made in the

PUD District, the owner or occupant shall obtain approval of a Final Development Plan as provided herein.

B. APPLICATION FOR PRELIMINARY PLAN APPROVAL. In order to allow the Planning Commission and the Township Board and the developer to reach an understanding of basic design concept and avoid unnecessary investment, the developer shall submit a preliminary development plan to the Planning Commission. The preliminary development plan shall be drawn to approximate scale and show clearly the following information:

1. Boundaries of the property.
2. Location map showing uses and ownership of abutting lands.
3. Location and height of all buildings.
4. Interior roadway system, parking facilities, and all existing rights-of-way and easements, whether public or private.
5. Delineation of the various residential or commercial areas; indicate for each such area its size, number of buildings, number of dwelling units, and approximate percentage allocation by dwelling unit.
6. Preliminary architectural sketches or a general statement as to the type of construction and materials to be used in the proposed buildings.
7. Interior open-space system.
8. If grades exceed thirty percent (30%), or portions of the site have a moderate to high susceptibility to erosion or a moderate to high susceptibility to

flooding or ponding, an overlay outlining the above susceptible soil shall be provided.

9. Principal ties to the neighborhood and community with respect to transportation, water supply, and sewage disposal.

10. General description of the provision of other community facilities such as schools, recreational facilities, fire protection and services, and cultural facilities, if any, and some indication of how these needs are proposed to be accommodated.

11. The period of time within which the project will be completed.

12. Additional information which the Planning Commission or its authorized representative may find reasonably necessary to evaluate the proposed development and its effect on surrounding areas.

13. A detailed statement outlining the reasons for requesting the PUD zone and uses proposed for the land. This statement shall include a schedule of development for the project and a statement regarding procedures to be established to maintain any open areas, private streets and parking areas.

C. PROVISIONS PLAN MUST INCLUDE. Each plan shall make provision for construction materials storage and screening of that area, off-street parking, loading zones, traffic patterns, landscaping, green strips, buffer zones, and other reasonable incidents of planning a development.

D. PRELIMINARY DEVELOPMENT PLAN DECISION. Approval of the preliminary

development plan by the Planning Commission may be conditioned upon suggested changes in the plan which are in accord with the spirit, purpose and intent of this section and the ordinances of the Charter Township of Allendale.

Final approval of a preliminary development plan shall be by the Charter Township Board and said plan shall be adopted as an ordinance amendment (rezoning) by the procedures established in Article 29 for amendments to this ordinance. The ordinance shall specify the permitted uses, which shall exclude any other uses. District zoning classifications under the ordinances of the Charter Township of Allendale may be included or incorporated by reference, if necessary.

Approval of the Preliminary Development Plan by the Planning Commission and the Township Board shall not constitute approval of the detailed site plan, but shall be deemed an expression of approval of the layout as a guide to the preparation of the detailed plan.

E. FINAL DEVELOPMENT PLAN. Development or improvement of lots or areas within said district after approval and adoption of a Preliminary Development Plan shall be accomplished by submission to the Planning Commission of a Final Development Plan for each phase of the development, which shall include such of the following information as the Planning Commission finds reasonably necessary to consider said Plan:

1. A final site plan as described in Section 23.06.
2. A description of the proposed operation in sufficient detail to indicate the noise, smoke, odor, vibration, dust and dirt, noxious gasses, glare and heat, fire hazards, industrial wastes and traffic which may be produced by such operation.
3. Engineering and architectural plans for controlling problems of the type enumerated under item (2) above, if deemed necessary by the developer or if required by the Planning Commission or its authorized representative.

F. ENERVATING, DEBILITATING; CONTROL DEVICES. If the Planning Commission shall determine that the proposed use of the land as shown on the Final Development Plan might have an enervating, debilitating, or offensive effect on adjacent properties, whether industrial, commercial, residential or other, through the effects of noise, smoke, odor, dust and dirt, and noxious gases, glare and heat, vibrations, fire hazards, industrial wastes or traffic, or adverse aesthetic effects, the Commission may require the owner, through the use of qualified technical persons and acceptable testing techniques, to demonstrate the devices which shall be utilized to control the factors determined to be offensive. Upon acceptance by the Planning Commission of such control devices, they shall be incorporated as a part of the Final Development Plan.

G. PERFORMANCE BOND. The Planning Commission, in connection with approval of any application for a Final Development Plan, may

require reasonable undertakings by the applicant to guarantee and assure by agreement, including a performance bond to be posted by applicant, or by some other reasonable surety arrangement at appropriate stages of the planned development, that the development will be executed in accordance with the approved plan.

H. FINAL APPROVAL. The Planning Commission shall consider the Final Development Plan and shall, when appropriate, direct that specific changes be made to conform with the spirit, purpose and intent of this ordinance.

Final approval or disapproval of a Final Development Plan shall be by the Charter Township Board. A copy of said Final Development Plan, if finally approved, shall be forwarded to the Charter Township Zoning Administrator for filing.

I. RECORDING OF PLAT. The Planning Commission and the Charter Township Board are specially authorized to require the recording of a plat in connection with any such application when such would be required by the Subdivision Control Act of 1967, as amended, for the State of Michigan.

J. CHANGES TO AN APPROVED PLAN. Minor changes in the location and siting of buildings, structures, streets or parking areas, or in the extent of structural coverage, floor space, or setback, or in the amount of open space, after adoption of the P.U.D. preliminary development plan by the Charter Township Board, may be

authorized by the Planning Commission without additional public hearings if required by engineering or other circumstances not foreseen at the time the preliminary plan was approved. Notwithstanding, the Planning Commission, in its discretion, may decide to hold a public hearing on any deviation from the adopted P.U.D. site plan. No change or series of changes authorized by this subsection may cause any of the following:

1. A change in use or character of the development,
2. An increase of more than five (5) percent in site coverage of structures, or five (5) percent in overall floor space,
3. An increase in density of dwelling units,
4. An increase in anticipated problems related to traffic circulation or public utilities.
5. A reduction of more than five (5) percent in approved open space,
6. A reduction of off-street parking and loading space,
7. A reduction in pavement widths,
8. A reduction of more than twenty (20%) percent in structural setbacks from the P.U.D. boundary.

Sec. 12.04. GENERAL PROVISIONS.

A. The provisions of this Article shall apply only to a tract of land with a minimum area of ten (10) acres, which tract is under single ownership or proof of control through option to purchase or easement agreement. The minimum provisions may be waived by the Planning Commission if physical conditions such as poor soils, flood

plains, proximity to freeways or major arterials, railroads, topography or similar conditions may preclude or impose practical difficulty to design a traditional development.

B. No transition or use substitution privileges provided elsewhere in the ordinance shall apply to PUD District.

C. All of the provisions of the zoning, building and other ordinances of the Charter Township shall control in the PUD District except where inconsistent therewith, in which case the provisions of the PUD District shall supersede and control any other such provisions (See Section 3.03B2).

D. Appeals may not be made to the Board of Appeals regarding PUD provisions.

E. In the event that any section, clause or provision of this PUD District shall be declared by a court to be invalid, the same shall not affect the validity of this section as a whole, or any part thereof, other than the part so declared to be invalid.

F. In the event that any zoning or other procedures done under this PUD District shall be nullified by a court of competent jurisdiction, or in any other lawful manner, then the zoning of that area having been zoned under this PUD District shall be that district under which it was zoned immediately preceding its zoning under this PUD District.

G. The total number of dwelling units allowed in a project shall be determined by multiplying the net residential acreage of a project area, by the

following densities:

0-2.5 units per net residential acre for a PUD project without public sanitary sewer or water systems

2.6-4.9 units per net residential acre for PUD project with an approved public or community water or sewage system.

5.0-9.9 units per net residential acre for a PUD project with both a public water and public sanitary sewer systems.

H. Total ground area occupied by all buildings and structures may not exceed thirty-five (35%) percent of the total ground area of the PUD. The total ground areas shall be computed in acres and square feet within the boundaries of the PUD, and shall include public and private right of ways.

I. No building, structure or parking area may be erected closer than twenty-five (25) feet from any PUD Zone District line, provided that the Planning Commission may, after public hearing, determine that a greater setback, not to exceed one hundred (100) feet, should be required.

J. Parking shall be provided as required in Article 21 of this ordinance. If it is established that the proposed uses will not generate this need for parking, the Planning Commission may approve a lesser amount.

K. The stages of a PUD use development shall be so scheduled that, if later stages of the development are not implemented, the initial stage(s) shall be consistent with the provisions of this Ordinance and shall not detract from the feasibility of

developing the remaining portion of the subject PUD area in an appropriate and desirable manner.

L. Permitted uses in a P.U.D. district shall include any residential use including attached or unattached single family homes, two-family homes, multiple-family structures and mobile home parks or subdivisions, office or those non-residential uses permitted in residential zones, professional uses, and those C-1 or C-2 uses specifically authorized by the Planning Commission at the time of original approval or subsequent amendment.

M. If a final development plan has not been submitted by the developer within one year after approval of the preliminary development plan, the Planning Commission shall request a report from the developer regarding the status of the project. If construction has not begun and been diligently carried out towards implementing the P.U.D. project within three (3) years after preliminary approval, the Planning Commission may initiate a zone change amendment to restore the zoning to its previous classification. In initiating such a change, the Planning Commission shall follow all of the procedures established for zoning amendments in Article 29.

* * *

ARTICLE 20
SPECIAL USE PERMITS

Section 20.01 PURPOSE.

The development and execution of this Ordinance is based upon the division of the Township into zoning districts within which the uses of land and buildings and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are special land uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts without consideration in each case of the impact of those uses upon neighboring land and the public need for the particular use or the particular location. This Article provides the procedures, requirements and conditions for issuance of special use permits.

Section 20.02 PERMITTED USES.

Special Land Use Designation. Those uses which may be designated as special land uses are identified under Article 3 of this ordinance (General Provisions), or are listed in the district regulations for each of the zoning districts, being Articles 5 through 18 of this ordinance. Such uses are permitted only after the Planning Commission finds that the standards of Section 20.06 will be achieved by the proposed use.

Section 20.03 APPLICATION FOR A SPECIAL USE PERMIT.

A. Application for a special land use shall be filed with the Zoning Administrator on the proper form supplied by the Township.

B. The application shall be accompanied by a preliminary site plan as specified in Article 24, and

any other data required by the Zoning Administrator.

C. In addition, the applicant shall present a statement indicating how the proposed use will conform to the requirements set forth in Article 23 for the particular land use, if applicable.

D. The application shall be accompanied by a fee to be established by resolution of the Township Board to cover the expense of public hearings.

Section 20.04 HEARING ON APPLICATION.

Upon receipt in proper form of the application and accompanying documents, the Planning Commission shall hold a public hearing on the proposed special land use not more than forty five (45) days following the date of the receipt of the application by the Zoning Administrator. At least five (5) but not more than twenty (20) days in advance of such hearing, notice shall be published in a local newspaper of general circulation and shall be sent by mail or personal delivery to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet. The notice of public hearing must contain the following information: time and place of the hearing, description of the property in question, the use being proposed, and when and where written comments may be accepted.

Section 20.05 DECISION ON APPLICATION.

Following the public hearing, the Planning Commission may deny, approve, or approve with

conditions any application for a special land use. A final decision on the special land use application shall be made within 100 days of receipt of the application by the Zoning Administrator. The Planning Commission shall incorporate its decision in a statement of conclusions relative to the special land use under consideration. The statement shall specify the basis for the decision and any conditions imposed.

Section 20.06 STANDARDS.

No special land use shall be approved by the Planning Commission unless the Commission finds:

A. That the establishment, maintenance, or operation of the special land use will not be detrimental to or endanger the public wealth, safety, or general welfare.

B. That the special land use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor shall it substantially diminish and impair property values in the neighborhood.

C. That the establishment of the special land use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

D. That adequate utilities, access roads, drainage, and necessary facilities have been or are being provided.

E. That adequate measures have been or will be taken to provide ingress or egress so designed as to minimize traffic congestion in the public streets.

F. That the special land use shall, in all other

respects, conform to the applicable regulations of the district in which it is located and to any additional conditions or procedures as specified in Article 23.

Section 20.07 CONDITIONS AND GUARANTEES.

Prior to the granting of any special land use, the Planning Commission shall stipulate such conditions and restrictions upon the establishment, location, construction, maintenance, and operation of the special land use as deemed necessary for the protection of the public interest and to secure compliance with the standards and requirements specified in this Article. In all cases in which special land uses are granted, the Planning Commission shall require such evidence and guarantees as deemed necessary as proof that the conditions stipulated in connection therewith are being and will be complied with.

Section 20.08 EFFECT OF DENIAL.

No application for a special land use which has been denied wholly or in part by the Planning Commission shall be resubmitted for a period of one year from the date of said order of denial.

Section 20.09 NULLIFICATION.

In any case where a special land use has not been established within one year after the date of granting such use, the special land use shall automatically be declared null and void without further action by the Planning Commission. In addition, any use established as a special land use that is discontinued for one year or

longer shall not be reestablished without application to and approval by the Planning Commission.

Section 20.10 APPEAL.

An appeal of the decision of the Planning Commission may be taken to the Charter Township Board if such appeal is filed with the Township Clerk within fifteen (15) days of the decision by the Planning Commission. The appeal may be filed by the applicant, or by any property owner or occupant within three hundred (300) feet of the property in question. The Township Board shall decide the appeal on the basis of the standards provided in Section 20.06.

Section 20.11 ADDITIONAL REGULATIONS.

A. Nonconforming uses that are Special Land Uses - see Section 26.08.

B. Standards for Specific Uses - see Article 23.

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ARTICLE 23

STANDARDS FOR SPECIFIC USES

Sec. 23.01 DESCRIPTION PURPOSE.

The purpose of this Article is to establish supplementary standards to guide the review of certain kinds of uses which, because of their characteristics may have a detrimental effect upon adjacent properties, the neighborhood, or the community even if all other standards within this Ordinance are met. It is the intent of these standards to provide for proper design control to assure that these uses will not cause any unanticipated

problems or hazards and will be consistent with the Development Plan. It is further intended through these standards to recognize the importance of such uses by anticipating their locational and site design needs and by establishing appropriate standards for their development in advance of actual proposals.

* * *

Sec. 23.06 DESIGN STANDARDS FOR MAJOR RESIDENTIAL DEVELOPMENTS.

The following design standards shall apply to all multiple family or mobile home development sites designed for 25 or more dwelling units.

A. Recreation Facilities. Not less than eight (8) percent of the gross site area of the development sites shall be devoted to recreation facilities, generally provided in a central location. In developments of fifty (50) acres or more, recreation facilities can be decentralized with at least one area of open space to be two thirds of an acre or more. Recreation area may include space for community buildings and community use facilities such as indoor recreation area, swimming pool, hobby and repair shops, and service buildings.

B. Access Walks. All development sites shall be constructed with safe convenient paved pedestrian access walks.

C. Exposed Ground Surfaces. Exposed ground surfaces must be seeded or sodded in all parts of the development site. Drives and walkways shall

be maintained in a reasonable dustproof condition.

D. Water Supply. The water supply serving the development shall be obtained from a municipal source.

E. Sewage System. An adequate and safe sewage collection system shall be provided and connected to the municipal sewage system.

F. Utilities; Underground Installation. All public and private utilities shall be installed underground.

G. Drainage. All property in any development site shall be graded so as to be well drained, and a means of conveying storm water away from structures, streets and parking areas shall be provided. An adequate storm drainage system, including necessary storm sewers, drain inlets, manholes, culverts, bridges, retention or detention areas, and other appurtenances, shall be provided. The requirements for each particular proposed development site shall be established by the Township Engineer.

H. Garbage and Rubbish. Garbage and rubbish disposal facilities shall be provided in such a manner as approved by the health authority and located so as not to create a nuisance or a menace to health. Outdoor receptacles shall be screened from view.

I. Landscape Setback. All development sites must maintain fifty (50) foot landscape setback from any public street that borders the park boundaries and twenty-five (25) foot minimum landscaped

rear and side yards shall be provided and maintained adjacent to any adjoining properties. There shall be a greenbelt planting strip with a width of no less than twenty (20) feet along any property line where the adjacent property is located in the residential zones. Said planting strip may be located within the fifty (50) foot buffer area. The greenbelt planting strip shall contain at least one (1) straight or staggered row of trees (minimum caliper of two (2) inches), spaced not more than twenty (20) feet apart and at least three (3) rows of shrubs at least three (3) feet high at planting time spaced not more than eight (8) feet apart and which grow to an ultimate height of at least twelve (12) feet. Alternative landscape plans may be utilized if the intent of this section is upheld and if approved by the Planning Commission.

J. Paved Streets And Parking Areas. All streets and parking areas within a development site shall be paved.

K. Vehicular Access. Each development shall be provided with safe and convenient vehicular access from abutting public streets or roads to each lot or parking area. Such access shall be provided by hard surfaced paved streets. Each development shall provide direct access to a public street and shall provide a continuous route of travel throughout the development without driving parking areas. The Planning Commission may require two (2) separated access points to public streets where such is determined necessary

for public safety.

L. Street Width. Private two-way streets shall be paved to a width of twenty-four (24) feet.

M. Lighting. Each development shall be provided with lighting to illuminate all parking bays, streets, and sidewalks. Lighting fixtures shall be the "box-type" or equivalent, designed to illuminate the ground without shining in windows or onto adjacent streets.

N. Landscape Maintenance. All grass within a development shall be kept mowed, shrubbery trimmed and the site landscaped in a neat and attractive manner.

O. Building Separation. Any two (2) multiple family structures on the same lot shall be separated from each other by a distance equal to the height of the taller building, but not less than twenty (20) feet.

* * *

Sec. 23.11 FOSTER AND CHILD CARE FACILITIES.

A. Adult Foster Care Homes

1. The facility shall be located no closer than 1,500 feet to any other state licensed facility, except that this section shall not apply to any state licensed facility caring for three (3) persons or less.

2.The Planning Commission may approve additional facilities within 1500 feet of another provided that such additional facilities would not contribute to an excessive concentration of such facilities within a particular neighborhood.

* * *

Sec. 23.14. STANDARDS FOR SINGLE-FAMILY AND TWO-FAMILY STRUCTURES

All single family and two-family dwelling units (except mobile homes within licensed mobile home parks) shall comply with the following minimum requirements.

A. Area and Width. The dwelling unit shall meet or exceed the minimum floor area and minimum exterior width for dwellings, as specified in the applicable zone district regulations.

B. Foundations. All dwellings and any additions thereto shall be constructed upon and attached to a solid, permanent foundation located under the entire perimeter of the ground floor of the dwelling unit, with a depth of at least forty-two (42) inches below grade. The foundation shall comply with the provisions of the BOCA code and all applicable state regulations.

C. Storage Areas Required. All dwelling units shall provide enclosed storage space (either within a basement or in an attic or in a separate, fully enclosed accessory structure) of not than fifteen percent (15%) of the living area of the dwelling unit. The storage areas shall be provided in addition to the area devoted to the storage of automobiles. Storage areas in the basement, attic or separate accessory building shall not be counted in determining whether the dwelling unit complies with the minimum floor area requirements of this ordinance.

D. Steps or Porch Required. All dwelling units shall

provide permanent steps or porch areas where there exists an elevation differential of more than one (1) foot between the threshold of a door and the surrounding grade.

E. Additions. All additions or alterations to a dwelling shall be at least the same quality materials and workmanship as the original structure.

F. Roof Pitch. The roof of any such dwelling shall have a minimum pitch of three (3) inches rise for every one (1) foot of run, unless twenty percent (20%) of the residences located within one-half (1/2) mile have a lesser pitch, then the pitch equal to the average of those twenty percent (20%) may be provided. The roof shall be covered by either asphalt, fiberglass, or shake shingles.

G. Sewer and Water. All dwellings must be connected to the public sewer and water supply, where available. When such facilities are not available, on-site water supply and sewage disposal facilities are required, and must be approved by the Ottawa County Environmental Health Department.

* * *

Sec. 23.16 REQUIREMENTS FOR GROUP HOUSING.

All group housing shall comply with the following requirements:

A. Total ground area occupied by all buildings, structures, drives and parking shall not exceed 35%.

B. No new group housing structure or parking area may be erected closer than 50 feet from any R-4 zone district boundary line, provided that a greater setback not to exceed 100 feet may be required by the Planning Commission in its discretion.

C. Parking shall be provided as required in Article 21 of this zoning ordinance. If it is established that the proposed use will generate an additional need for parking in excess of the minimum parking required by Article 21, the Planning Commission, in its discretion, may require sufficient parking to meet the additional need.

D. A landscape plan satisfactory to the Planning Commission shall be required.

E. The entire front yard shall be landscaped with the exception of that area provided for paved vehicular drives or pedestrian access to and from the site.

ARTICLE 24
SITE PLAN REVIEW

Sec. 24.01 SCOPE.

Certain land uses are quite necessary to the proper development of a community, but likewise possess characteristics which warrant special treatment. These characteristics, in many situations, can easily become undesirable to some degree; basically because their intrinsic needs or appearance have a wide ranging influence beyond their own perimeter. To further the purposes of this Ordinance, it is hereby deemed prudent

and necessary to apply limits and guidelines which will both encourage good development and discourage undesirable effects on surrounding development. The provisions of Article 23 shall also apply to the following requirements, as applicable.

Sec. 24.02 PRE-APPLICATION CONFERENCE.

For the purpose of expediting applications and minimizing design and development costs, applicants are encouraged to discuss a proposed development with the Zoning Administrator early in the design phase of a development so that the applicant can be made aware of the development requirements affecting the proposed development.

The Zoning Administrator may consult with the township engineer, planner, drain commission, road commission or other agency as required, or may refer the applicant to the appropriate agency for additional information. The applicant shall not be bound by the plan reviewed in a pre-application review, nor shall the Planning Commission be bound by any such review.

Sec. 24.03 PRELIMINARY SITE PLAN REVIEW.

A property owner shall furnish a preliminary site plan to the Planning Commission in the following circumstances:

A. In connection with an application for a Special Use Permit.

B. In connection with an application for rezoning, if applicable, or an application for Planned Unit Development.

C. In connection with larger scale projects where the

development will be undertaken in several phases.

D. At the request of the applicant, as a precedent to submitting a final site plan.

If the preliminary site plan is approved, a final site plan incorporating any conditions imposed shall be submitted for review. The Planning Commission may delegate approval of the final site plan to the Zoning Administrator, if the Commission deems it to be appropriate.

Sec. 24.04 SITE PLANS.

Prior to the creation of a use or the erection of a building, a Site Plan shall be submitted for review by the Zoning Administrator or Planning Commission as provided below:

A. Permitted uses in the following Districts shall be subject to Site Plan Review by the Planning Commission:

1. R-3 Residential
2. R-4 Residential
3. R-5 Residential
4. C-1 Commercial
5. C-2 Commercial
6. C-3 Commercial
7. I-1 Industrial
8. PID Industrial
9. Special land uses in all Districts.

B. The following shall be exempt from Planning Commission review of their site plans in all districts:

1. A single or two family dwelling or mobile home

on a lot on which there exists no other principle building or use.

2. The removal of one thousand (1000)yards or less of topsoil, sand, gravel, or minerals.

C. The Planning Commission may waive site plan review for a particular project or for a particular class of projects.

D. All site plans exempted from review by the Planning Commission shall be subject to approval by the Zoning Administrator. The staff shall be authorized to approve, disapprove, or approve subject to conditions all site plans exempted from review by the Planning Commission. If the site plan is disapproved by the staff, the applicant shall have the right of appeal to the Planning Commission.

Sec. 24.05 PRELIMINARY SITE PLAN REQUIREMENTS.

Each preliminary site plan shall contain the following information unless specifically waived by the Zoning Administrator or Planning Commission in whole or in part:

A. The date, north arrow, and scale. The scale shall be not more than 1" = 20' if the subject property is less two (2) acres; 1" = 40' if the site is less than six (6) acres; and 1" = 100 feet if the site is greater than six (6) acres.

B. The name and firm address of the professional individual responsible for the preparation of the site plan.

C. The name and address of the property owner or

petitioner, and proof of ownership or option to purchase.

D. A locational sketch drawn to scale.

E. Legal description and common or popular description of the subject property.

F. The size in acres and square feet of the subject property.

G. All lot or property lines are to be shown with bearings and dimensions, including building setback lines on corner lots.

H. The location of all existing structures within one hundred (100) feet of the subject property's boundary.

I. The location of all existing and proposed structures on the subject property.

J. The location and dimensions of all existing and proposed drives, sidewalks, curb openings, parking areas including total number of parking spaces, recreation areas, common use areas, and areas to be conveyed for public use and purpose.

K. The location, pavement width and right-of-way width of all abutting roads, streets, alleys, or easements. Land must be reserved and shown on the site plan for any major streets proposed on the Major Street Plan that would go through any part of the site.

L. The existing zoning of all properties abutting the subject property.

M. The preliminary site development plan must be certified by a registered professional engineer as to whether the preliminary layout of the buildings can be adequately serviced by sanitary sewer or

septic system, public water or private well, and storm drainage facilities.

N. The location and size of any established flood plain areas, bodies of water, or other unbuildable areas if present on the site.

O. For all site plans, contour intervals shall be shown at five (5) foot intervals.

P. Summary schedules and views should be affixed as applicable in residential developments, which give the following data:

1. The net residential site as defined in Article 32 expressed in acres and in square feet, including breakdowns of both measured for any sub-areas or staging areas.
2. The number of dwelling units proposed (by type).
3. Typical lot size dimensions if detached housing is contemplated.
4. Typical elevation views of the front and side and rear of each type of building.
5. Proposed density of the net residential site.

Q. An accurate 1" = 20' or larger scale landscape design plan which, at a minimum, shall include:

1. The name and address of the professional individual responsible for the preparation of the site plan.
2. Property dimensions for the subject property and a north arrow.
3. The location, type, and size of major existing plant materials, including all trees, with information as to which materials will be removed, retained, or relocated.
4. The location, type, and size (tree, shrub, ground

cover, or grass) of proposed landscaping in the proposed landscape areas.

5. The location and a description of proposed earth berms, walls, fences, screens, sculptures, fountains, street furniture, and light fixtures.
6. The location, size and surface materials proposed for storm water detention areas, parking areas, driveways, curb cuts, and sidewalks or pedestrian walkways.
7. The location, type and other pertinent information related to the irrigation system.
8. The areas proposed to be landscaped in conjunction with buildings or parking lot improvements and those areas proposed for landscaping in connection with future development.
9. A certification by a licensed landscape architect that the plan satisfies the requirements of this Ordinance subsection.

R. Proposed phasing plans.

24.06 FINAL SITE PLAN REQUIREMENTS.

Each Final Site Plan submitted shall contain the following information, unless specifically waived by the Zoning Administrator or Planning Commission, in whole or in part:

A. The date, north arrow, and scale. The scale shall be not more than 1" = 20' if the subject property is less than two (2) acres; 1" = 40' if the site is less than six (6) acres; and 1" = 100 feet if the site is greater than six (6) acres.

B. The name and firm address of the professional

individual responsible for the preparation of the site plan (including imprint of his or her professional seal).

C. The name and address of the property owner or petitioner, and proof of ownership or option to purchase.

D. A locational sketch drawn to scale.

E. Legal description and common or popular description of the subject property.

F. The size in acres and square feet of the subject property.

G. All lot or property lines are to be shown with bearings and dimensions, including building setback lines on corner lots.

H. The location of all existing structures within one hundred (100) feet of the subject property's boundary.

I. The location and dimensions of all existing and proposes structures on the subject property.

J. The location and dimensions of all existing and proposed drives, sidewalks, curb openings, signs, exterior lighting, curbing, parking areas including total number of parking spaces (show dimensions of a typical parking space), unloading areas, recreation areas, common use areas, and areas to be conveyed for public use and purpose.

K. The location, pavement width, and right-of-way width of all abutting roads, streets, alleys, or easements. Land must be reserved and shown on the site plan for any major streets proposed on the Street Plan that would go through or adjacent to any part of the site.

L. The existing zoning of all properties abutting the subject property.

M. An accurate 1" = 20' or larger scale landscape design plan which, at a minimum, shall include:

1. The name and address of the professional individual responsible for the preparation of the site plan.
2. Property dimensions for the subject property and a north arrow.
3. The location, type, and size of major existing plant materials, including all trees, with information as to which materials will be removed, retained, or relocated.
4. The location, type, and size (tree, shrub, ground cover or grass) of proposed landscaping in the proposed landscape areas.
5. The location and a description of proposed earth berms, walls, fences, screens, sculptures, fountains, street furniture, and light fixtures.
6. The location, size and surface materials proposed for storm water detention areas, parking areas, driveways, curb cuts, and sidewalks or pedestrian walkways.
7. The location, type and other information related to an irrigation system.
8. The areas proposed to be landscaped in conjunction with buildings or parking lot improvements and those areas proposed for landscaping in connection with future development.
9. A certification by a licensed landscape architect that the submitted plan satisfies the requirements

of this Ordinance subsection.

N. Size and location of existing and proposed hydrants and utilities, including proposed connections to public sewer or water supply systems.

O. The location and size of all subsurface and surface water drainage facilities, existing and proposed; and any established flood plain areas, bodies of water or other unbuildable areas if present on the site.

P. Topography: contour intervals shall be shown at five (5) foot intervals. If the change in contours on the site is less than ten (10) feet, the site plan shall show contours at one (1) foot intervals.

Q. Architectural elevations of the proposed building or buildings.

R. Summary schedules and views should be affixed as applicable in residential developments, which give the following data:

1. The net residential site as defined as Article 32 expressed in acres and in square feet, including breakdowns of both measured for any sub-areas or staging areas.

2. The number of dwelling units proposed (by type), including typical floor plans for each type of dwelling unit.

3. The number and location by code if necessary) of efficiency and one or more bedroom units.

4. Typical elevation views of the front and side and rear of each type of building.

5. Proposed density of the net residential site.

S. Signs, existing and proposed.

T. Phasing plans.
U. Exterior lighting, including street, parking lot, and general; by location and type of fixture.
V. Proposed solid waste disposal facilities.

Sec. 24.07 SUBMITTAL AND APPROVAL.

The Site Plan, including additional or related information required by the Planning Commission, shall be presented to the Zoning Administrator by the petitioner or property owner or his designated agent, in twelve (12) copies. The Zoning Administrator shall place the submittal on the agenda of the next work session Planning Commission meeting, if necessary. The Planning Commission shall not act on a request for site plan approval until the applicant has paid the appropriate processing fee.

The Zoning Administrator or Planning Commission have the responsibility and authority to approve, disapprove, or approve subject to conditions, all site plans submitted to it under this Chapter.

Any conditions or modifications desired by the Planning Commission shall be recorded in the minutes of the appropriate Planning Commission meeting. The Planning Commission or Zoning Administrator may as it deems necessary to promote the purpose of this Ordinance, require landscaping, walls, fences, drives, and other improvements. When approved, at least two (2) copies of the final approved Site Plan shall be signed and dated by the Zoning Administrator. One of these two (2) approved copies shall be kept on file by the Zoning Administrator and the other approved copy shall be returned to the petitioner or his designated

representative.

A Site Plan Review approval granted pursuant to this ordinance shall be valid for one (1) year from the date of approval. If construction has not commenced and proceeded meaningfully toward completion by the end of this period, the Site Plan Approval will expire. Expired Site Plans must be resubmitted for Planning Commission Approval.

Sec. 24.08 PLAT REQUIREMENTS.

In those instances in which Act 288, Public Acts of 1967, as amended, The Subdivision Control Act of 1967, is involved, the owner shall, after Site Plan approval, submit the preliminary and final plats to the proper officer in conformance with Act 288, and in accordance with all other applicable codes, acts, and ordinances. Such plats shall conform to the approved Site Plan.

Sec. 24.09 CHANGES IN THE APPROVED SITE PLAN.

Major changes (increased density, additional buildings, and other changes determined by the Zoning Administrator to be major), to the approved final Site Plan shall be applied for by the applicant to the Planning Commission. Any major changes approved in the final site plan shall be recorded with the site plan and shall bear the signature of the Zoning Administrator and the date of approval.

Any minor changes (minor dimension changes, building location, parking, and drives, etc.), may be approved by the Zoning Administrator. The approved changes shall be noted on the site plan and bear the signature of the Zoning Administrator.

No changes are to be considered as a waiver of conditions or covenants, and all rights to enforce such conditions or covenants against any changes permitted by this Ordinance are expressly reserved.

Sec. 24.10 APPEAL.

If any person shall be aggrieved by the action of the Planning Commission as a result of Site Plan Review, appeal in writing to the Township Board may be taken within ten (10) days after the date of such action. The Township Board shall fix and notify the appellant of a time and place for a public hearing to be published in a newspaper of general circulation in the Township not less than fifteen (15) days prior to the hearing. All parties in interest shall be afforded the opportunity to be heard thereat. After such hearing, the Township Board shall affirm or reverse the action of the Planning Commission, stating its findings and the reasons for its action and a written copy of such findings, reasons and actions shall be given to the appellant.

Sec. 24.11 REVIEW STANDARDS.

The following standards shall be utilized by the Planning Commission and Zoning Administrator in reviewing all site plans. These standards are intended to provide a frame of reference for the applicant in the preparation of site plans as well as for the reviewing authority in making a judgement concerning them. These standards shall not be regarded as inflexible requirements. They are not intended to discourage creativity, invention, or innovation.

A. Landscape Preservation: The landscape shall be

preserved in its natural state, insofar as practicable, by minimizing tree and soil removal, and by insuring that all grade changes conform to the general appearance of neighboring developed areas.

1. To the extent feasible, the approved landscaping shall be installed prior to the issuance of a Certificate of Occupancy.
2. The current property owner shall be responsible for the maintenance of the landscaping as originally approved and installed. This requirement includes the mowing of grass, weeding, irrigating, fertilizing, and pruning. Grass areas landscaped in conjunction with buildings or parking lots shall not exceed four (4) inches in height. Ground cover areas designed for future development shall not exceed eight (8) inches in height.
3. Landscape materials which exhibit evidence of insects, pests, diseases, and/or damage shall be promptly and appropriately treated and all dead plant material shall be promptly removed and replaced with living plant material.
4. All landscape areas shall be kept free ofrefuse and debris and shall be provided with irrigation sufficient to maintain such areas in a healthy and growing condition.

B. Relation of Buildings to Environment: Proposed structures shall be related harmoniously to the terrain and to the existing buildings in the vicinity that have a visual relationship to the proposed buildings. The achievement of such relationship

may include the enclosure of space in conjunction with other existing buildings or other proposed buildings and the creation of focal points with respect to avenues of approach, terrain features, or other buildings.

C. Drives, Parking, and Circulation: With respect to vehicular and pedestrian circulation, including walkways, interior drives and parking, special attention shall be given to location and number of access points, general interior circulation, separation of pedestrian and vehicular traffic, and arrangement of parking areas that are safe and convenient and, insofar as practicable, do not detract from the design of the proposed buildings and structures and the neighboring properties.

1. All parking areas consisting of twenty (20) or more spaces shall have a minimum of twenty (20) square feet of interior landscaping per parking space. Such landscape areas shall consist of either sod, ground cover, shrubs, or trees and be protected from vehicle access by the installation of a raised concrete curbing or other suitable protective device.
2. All internal landscaped areas shall be located so as not to impede drainage or traffic circulation.
3. All parking area perimeters shall be constructed with continuous concrete curbing.

D. Surface Water Drainage: Special attention shall be given to proper site surface drainage so that removal of surface waters will not adversely affect neighboring properties or the public storm drainage system. If practical, storm water shall be

removed from all roofs, canopies, and paved areas and carried away in an underground drainage system. Temporary on-site storage to reduce peak run-off from the site is encouraged. Surface water in all paved areas shall be collected at intervals so that it will not obstruct the flow of vehicular or pedestrian traffic, and will not create puddles in the paved areas.

E. Utility Service: Electric and telephone distribution lines shall be underground where appropriate. Any utility installations remaining above ground shall be located so as to have a harmonious relationship to neighboring properties and the site. Connection to public sewer and water facilities in accordance with township standards shall be provided where available. On-site sewage systems shall be approved by the County Health Department.

F. Advertising Features: The size, location, and lighting of all permanent signs and outdoor advertising structures or features shall be consistent with the requirements of this Ordinance.

G. Special Features: Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings and structures, and similar accessory areas shall be subject to such setbacks, screen planting, or other screening methods as may reasonably be required to prevent their being incongruous with the existing or contemplated environment and the surrounding properties.

H. Appearance: In granting site plan review approval, the Zoning Administrator or Planning Commission may require certain designs, textures, colors, or architectural treatments for any building or structures, which in its judgement produce a harmonious, pleasing, and desirable appearance.

I. Waste Disposal: Suitable locations for solid waste disposal facilities shall be identified on the site plan.

Sec. 24.12 PERFORMANCE BOND REQUIREMENT.

A surety company performance bond acceptable to the Township, irrevocable bank letter of credit, certified check or cash deposit, conditioned upon construction and development in accordance with the requirements of this Ordinance and the Final Approved Site Plan and all of its components, may be required by the Planning Commission to be filed with the Zoning Administrator at the time of issuance of a building permit. The bond, letter of credit, certified check or deposit shall be in such amount and for such period of time as, in the discretion of the Planning Commission, appears adequate to ensure compliance with the requirements of this Ordinance and the Final Approved Site Plan and all of its components.

Such bond, letter of credit, certified check or deposit shall be security for the completion of those improvements upon which approval is conditioned for the protection of natural resources or the health, safety, and welfare of the residents of the Township and future users or inhabitants of the proposed project or project area, including roadways, lighting, utilities, sidewalks,

screening and drainage.

Where a cash deposit is made in lieu of a bond, certified check or letter of credit, the Township shall rebate the same in reasonable proportion to the ratio of work completed for which the deposit has been required, provided that the amount remaining on deposit still provides reasonable security for the completion of the unfinished improvements germane to the deposit.

* * *

ARTICLE 28
ZONING BOARD OF APPEALS

Sec. 28.01 CREATION.

There is hereby created a Zoning Board of Appeals which have the powers and jurisdiction as provided by Act 184 of the Public Acts of 1943, and by certain provisions of this ordinance. The Zoning Board of Appeals shall consist of seven (7) electors of the Township. The membership of the Board shall be as provided by said Act.

Sec. 28.02 ADDITIONAL JURISDICTION.

In addition to the duties and powers prescribed in the previous sections of this ordinance, the Board of Appeals shall hear and decide all matters relating to the following:

A. The Board of Appeals shall hear and decide appeals from and review any order, requirements, decisions, or determinations made by any administrative official charged with the

enforcement of any provisions of this ordinance, except that the Board of Appeals shall not hear and decide appeals from any decision or order of the Planning Commission with respect to applications for special use permits or planned unit developments, nor shall it hear appeals from the decisions of the Township Board regarding the same matters.

B. The Board of Appeals shall act upon all questions as they may arise in the administration of this ordinance, including the interpretation of the zoning maps, and may fix rules and regulations to govern its procedures as such Board of Appeals.

Sec. 28.03 PROCEDURE ON APPEAL.

A. All appeals from any order, requirements, decision, or determination or any administrative official shall be taken within such time as shall be prescribed by the Board of Appeals by general rule, by filing with the officer from whom the appeals are taken and with the Board of appeals a notice of appeal specifying the grounds thereof. The administrative official from whom the appeal is taken shall forthwith transmit to the Board of Appeals all the papers constituting the record upon which the action appealed was taken. Each appeal or application to the Board of Appeals shall be accompanied by a filing fee as specified by resolution of the Charter Townwhip Board.

B. The concurring vote of a majority of the members of the Board of Appeals shall be necessary to reverse any order, requirements, decision, or

determination of any administrative official or to decide in favor of the appellant on any matter appealed.

C. The Board of Appeals shall fix a reasonable time for a public hearing on the appeal and give due notice thereof to the parties. The Board shall decide the appeal within a reasonable time after said hearing. At the hearing, any party may appear in person or by agent or attorney. The Board of Appeals may reverse or affirm, wholly or partly, or may modify the order, requirements, decision, or determination as in its opinion ought to be done, and to that end shall have all the powers of the administrative official from whom the appeal was taken. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, the Board of Appeals shall have the power in passing upon appeals to vary or modify any of the rules, regulations, or provisions relating to the construction, erection, or alteration of buildings or structures so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done. The Board of Appeals shall state the grounds of each determination.

D. Upon receipt of an appeal, the Township Clerk shall notify by mail or personal delivery all persons to whom real property is assessed within three hundred (300) feet of the boundary of the property in question that an appeal has been filed. Notice shall also be given to the occupants of all structures within three hundred (300) feet. If the

name of the occupant is not known, the term "occupant" may be used in making notification. Notification need not be given to more one (1) occupant of a structure, except that if a structure contains more then one (1) dwelling unit or spatial area owned or leased by different individuals, partnerships, businesses, or organizations, one (1) occupant of each unit or spatial area shall receive notice. In the case of a single structure containing more than four (4) dwelling units or other distinct spatial areas owned or leased by different individuals, partnerships, businesses, or organizations, notice may be given to the manager or owner of the structure who shall be requested to post the notice at the primary entrance to the structure.

The notice shall be given not less than five (5) nor more than fifteen (15) days before the date of the public hearing.

The notice shall:

1. Describe the nature of the appeal.
2. Indicate the description or location of the property.
3. State the time and location of the public hearing.
4. Indicate when and where written comments will be received.
5. Indicate the date of the public hearing.

Sec. 28.04 VARIANCES; POWERS AND STANDARDS.

The Board of Appeals shall have the power to hear and decide in accordance with the provisions of this ordinance any request for interpretation of the Zoning

Ordinance, requests for variances, and decide any special questions on which the Board is authorized to pass.

The Board shall have the power to authorize, upon appeal in specific cases, such variances from the provisions or requirements of this ordinance as will not be contrary to the public interest, but only in such cases where the Board finds beyond a reasonable doubt that owing to special conditions pertaining to a specific piece of property, the literal enforcement of the provisions or requirements of this ordinance would cause practical difficulty and where it finds that all of the following facts and conditions exist:

A. That compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

B. That the granting of the variance applied for would do substantial justice to the applicant, as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

C. That the plight of the landowner is due to the unique circumstances of the property.

D. That the problem is not self-created, nor created by the applicant's predecessor in interest.

E. That granting the variance will insure that the spirit of the ordinance is observed, public safety secured, and substantial justice done.

Sec. 28.05 LAND USE VARIANCES.

Under no circumstances shall the Board of Appeals grant a variance to allow a use not permissible under the terms of this ordinance in the zoning district involved, or any use expressly or by implication prohibited by the terms of this ordinance in said district. The Board of Appeals cannot grant use variances at all or use its variance authority to accomplish what would, in effect, be rezoning.

Sec. 28.06 RECONSIDERATION OF A DECISION OF THE BOARD.

The Board of Appeals may reconsider its decision on any matter provided that a request for reconsideration is filed with the Township Zoning Administrator within fifteen (15) days of the date of decision. The request for reconsideration shall include submission of substantial new evidence that was not available at the time of the hearing. In the event that the Board of Appeals decides to reconsider a decision, it shall schedule a new hearing and proper notice given to all affected property owners and occupants.

Sec. 28.07 BOARD MEMBERS ACTIONS.

Members of the Board of Appeals shall be removable by the Township Board for nonperformance of duty or misconduct in office upon written charges and after public hearing. A member shall disqualify himself or herself from a vote in which the member has a conflict of interest. Failure of a member to disqualify himself or herself from a vote in which the member has a conflict of interest shall constitute misconduct in office.

Sec. 28.08 QUORUM, VOTE.

The Board of Appeals shall not conduct business unless a majority of the members of the board are present. The concurring vote of a majority of the members of the Board of Appeals shall be necessary to reverse an order, requirement, decision, or determination of administrative official or body, or to decide in favor of the applicant any matter upon which they are required to pass under or to effect any variation from the provisions of this ordinance.

Sec. 28.09 STAY OF PROCEEDINGS.

An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the township Board of Appeals after the notice of appeal has been filed with him that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Appeals or by the circuit court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

Sec. 28.10 DECISION FINAL.

Any decision of the Board of Appeals rendered pursuant to this Article shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court.

ARTICLE 29
AMENDMENTS AND DISTRICT CHANGES;

PROCEDURES

Whenever the public necessity, convenience, general welfare or good zoning practice require, the regulations, restrictions, and district boundaries set forth in this ordinance may be amended, supplemented, changed, or repealed, provided, however, that no such action may be taken until a public hearing is held in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard.

An amendment, supplement, or change to the text or map of the Zoning Ordinance may be initiated by the Charter Township Board or the Charter Township Planning Commission on a motion by either of these bodies, or by a verified application of one (1) or more of the owners or lessees of property within the area proposed to be changed or affected by this ordinance.

Sec. 29.01 PROCEDURE FOR CHANGES.

A. APPLICATIONS. An application for amendment or district change shall be submitted to the Charter Township Planning Commission on forms prescribed by the Planning Commission. Each application must be complete, and the Planning Commission may reject any application which is not complete. Each application shall be accompanied by the appropriate filing fee and a preliminary site development, as specified in Section 24.05.

B. NOTICE OF PUBLIC HEARING. Before submitting its recommendations on a proposed amendment of the text or a district change, the Planning Commission shall hold at least one (1)

public hearing. Notice of the hearing shall be given by two (2) publications in a newspaper of general circulation in the Charter Township, the first notice to be printed not more than thirty (30) days nor less than twenty (20) days, and the second notice not more than eight (8) days prior to the date of such hearing. Not less than twenty (20) days notice of the time and place of such hearing shall also be given by certified mail to each electric, gas, pipeline, and telephone public utility company that registers its name and mailing address with the Charter Township Planning Commission for the purpose of receiving such notice and to each railroad operating within the district or zone affected. The notices shall include the places and times at which the proposed amendment to the text or the district change any maps of this ordinance may be examined.

If an individual property or several adjacent properties are proposed for rezoning, the Planning Commission shall give notice of the proposed rezoning to the owner of the property in question, to all persons to whom any real property within three hundred (300) feet of the premises in question is assessed, and to the occupants of all single and two-family dwellings within three hundred (300) feet. The notice shall be delivered personally or by mail to the respective owners and occupants at the address given in the last assessment roll. If the tenant's name is not known, the term "occupant" may be used. If the notice is

delivered by mail, an affidavit of mailing shall be filed with the planning commission before the hearing. The notice shall be made not less than eight (8) days before the hearing.

C. PUBLIC HEARING. The public hearing shall be held on the date and at the time specified in the notice. The public hearing may be adjourned by the Planning Commission for good cause. In that event, notices of the adjourned hearing shall be given in the same manner as specified above, and the party requesting the adjournment shall reimburse the Township for the costs of renoticing the adjourned public hearing. The public hearing shall be conducted by the Planning Commission, and all interested persons shall be afforded an opportunity to present written or oral comments.

D. COUNTY PLANNING COMMISSION. Following the hearing or hearings, the Charter Township Planning Commission shall submit the proposed amendment to the County Planning Commission for approval, disapproval, or suggestions. The approval of the County Planning Commission shall be conclusively presumed unless the Commission notifies the Charter Township Clerk to the contrary within thirty days of its receipt of the proposed amendment.

E. CHARTER TOWNSHIP BOARD. The Planning Commission shall then submit the proposed amendment to the Charter Township Board recommending, in writing, that it be granted or denied. After receiving the report, the Charter

Township Board shall grant a hearing on the proposed amendment to any property owner who by certified mail requests to be so heard or may schedule a hearing on the matter of its own volition. The Charter Township Board shall request that a representative of the Planning Commission to attend any such hearing to present its recommendation on the matter.

Sec. 29.02 RE-HEARING ON CHANGES.

Whenever a proposed amendment or district change has not been adopted by the Charter Township Board, the Planning Commission shall not consider the same amendment or district change for a period of one (1) year, unless it is determines that new conditions and circumstances exist, or unless the Township Board initiates a request for such amendment or district change.

* * *

ARTICLE 32
DEFINITIONS

For the purposes of this ordinance, certain terms or words used herein shall be interpreted as follows:

Sec. 32.01 USAGE.

The word "person" includes a firm, association, organization, partnership trust, company, or corporation as well as an individual. Words used in the present tense include the future tense. The singular includes the plural; the plural includes the singular. The word "lot" includes

the words "plot" or "parcel". The word "shall" is mandatory; the word "may" is permissive, the word "used" or "occupied" includes the words "intended, designed, or arranged to be used or occupied".

Sec. 32.02 DEFINITIONS (A).

* * *

ADULT FOSTER CARE SMALL GROUP HOME. A private home which provides resident services for 6 or less persons under 24-hour supervision or care for persons in need of such care.

* * *

ANIMAL RAISING, INTENSIVE. The use of any premises for the raising or keeping of animals at a density exceeding the limits established in Section 23.02.A or B.

* * *

Sec. 32.04 DEFINITIONS (C).

* * *

CONVALESCENT, NURSING OR GROUP HOME. A home in which more than six (6) resident persons are cared for. Said home is for the aged or infirm, or a place for those suffering bodily disorders, mental illness, mental retardation, or for the care of children. Said home shall conform and qualify for license under State law.

CONFINED FEEDING OPERATION. A feedlot or facility, other than a pasture, where animals have been, are, or will be confined, maintained, or stabled for a total of 45 consecutive days or more in any 12 month period.

Sec. 32.05 DEFINITIONS (D).

* * *

DWELLING. Any building or portion thereof which is occupied in whole or in part as a home, residence, or sleeping place, either permanently or temporarily by one or more persons.

1. Dwelling, Single-Family: A detached residence, designed for use or occupancy by one (1) household only, with housekeeping facilities.

* * *

Sec. 32.07 DEFINITIONS (F).

* * *

FARM. Real property used for commercial agriculture, comprising at least forty (40) contiguous acres which may contain other non-contiguous acreage, all of which is operated by a person, including all necessary farm buildings, structures and machinery. In addition, a tract of land may be considered a farm if it is between 5 and 40 acres and it is devote primarily to an agricultural use, and has produced a gross annual income from agriculture of $200.00 or more per year per acre of cleared and tillable land.

FARM BUILDINGS. Any building or accessory structure other than a farm dwelling unit, which is used for farm operations, such as but not limited to a barn, silo, grain bin, farm implement storage building, or milk house.

FARM OPERATIONS. A condition or activity which occurs on a farm in connection with commercial agriculture, and includes but is not limited to marketing of produce at roadside stands or farm markets; noise; odors; dust; fumes; operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the

employment and use of labor.

FARM PRODUCTS. Those plants and animals useful to man including but not limited to: forages and sod crops, dairy and dairy products, poultry and poultry products, livestock, fruits and vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine and other similar products; or any other product which incorporates the use of food, fiber, feed, or fur.

* * *

Sec. 32.13 DEFINITIONS (L).

* * *

LOT. A piece or parcel of land occupied or intended to be occupied by only one principal building and its accessory buildings or utilized for only one principal use, together with such open spaces as required by this ordinance and having frontage on a public street or officially approved private street. A lot is a parcel of land, whether platted or unplatted, which is contiguous and under the same ownership.

* * *

Sec. 32.19 DEFINITIONS ®).

* * *

RESIDENTIAL ZONE OR DISTRICT. All land located in the R-1, R-2, R-3, R-4 or R-5 zoning districts as shown on the official zoning map.

* * *

Sec. 32.20 DEFINITIONS (S).

* * *

SETBACK. The minimum horizontal distance from a lot line to the nearest roofed portion of any building or structure on said lot.

* * *

SITE PLAN. A reproducible plan showing all salient features of a proposed development, so that it may be evaluated in order to determine whether it meets the provisions of this ordinance.

SPECIAL USE. Certain uses that may be permitted only after a review of the effects of such uses on adjoining lands and the general welfare of the township. Such uses require special consideration to insure compatibility and proper development in accordance with the intent of this Ordinance. Special uses are designated in the various zoning districts.

SPECIAL USE PERMIT. The procedure for authorizing a special use according to the requirements established in this Ordinance as prescribed in Article 20.

* * *

STRUCTURE. Anything constructed or erected, the use of which requires permanent location on the ground, or attachment to something having a permanent location on the ground.

* * *

Sec. 32.22 DEFINITIONS (U).

USES PERMITTED BY SPECIAL USE PERMIT. Listed uses which may be permitted in specified zoning districts provided that need for the use in the district can be established to the satisfaction of the Planning Commission based on the standards in Article 20.

Sec. 32.23 DEFINITIONS (V).

VARIANCE. A variance is defined as a modification of the terms of this ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of

the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship. As used in this ordinance, a variance is authorized only for height, area, and size of structure of size of yards and open spaces and off-street parking and off-street loading requirements; established or expansion of a use otherwise prohibited shall not be by variance, nor shall a variance be granted because of the presence of nonconformities in the zoning district or adjoining zoning districts.

ALLENDALE CHARTER TOWNSHIP
ZONING BOARD OF APPEALS

Date: January 9, 1997
Time: 7:30 PM
Place: Allendale Township Hall

Members Present:	Russell V Brown Jr., Robert Fansler, Mark Kidd, Ivan Kraker
Members Absent:	Edward Elzinga.
Staff Present:	Phillip Brummel, Building & Zoning Administrator.
Guests:	Tom Amor, Amor Sign Studios
	David Scigliano, Crystal Flash
Refer Exhibit D, Attached	Thomas C. Shearer, Attorney at Saw
	Phil Forner
	James Nelson, Attorney at Law
	Harley Sietsema
	Marcia Sietsema
	Steve LaBrecque
	Larry Bruins
	Curt Bruins

The meeting was called to order by Phillip Brummel at approximately 7:30 PM.

Election of Officers for 1997:

Motion by Russ Brown and **supported** by Mark Kidd that Robert Fansler be elected as Chairman of the Board.

Motion Carried **4-0**

Motion by Russ Brown and **supported** by Ivan Kraker that Mark Kidd be elected as Vice Chairman of the Board.

Motion Carried 4-0

Motion by Mark Kidd and **supported** by Robert Fansler that Russ Brown be elected as Secretary/Treasurer of the Board.

Motion Carried 4-0

Old Business:

Motion to accept the minutes of the October 10, 1996 Zoning Board meeting as amended below was made by Mark Kidd and **supported** by Ivan Kracker.

Corrections to October 10, 1996 Zoning Board Minutes:

Page 1

Guests, Change **Steve** Zeinstra to read Stan Zeinstra

Item A, Change **Heading** to read Amor Sign Studios

Change **1st paragraph** Tom Armor from Armor to read: Tom Amor from Amor

Page 3

Item C, Change name in second paragraph from Mr. Steve Zeinstra to read Mr. Stan Zeinstra.

Motion Carried 4-0

New Business: Reference attached Agenda dated January 9, 1997 marked **Exhibit A** and Notice of Public Hearing marked **Exhibit B**.

1.) Letter was received from John Van Timmeren dated 1/06/97 stating that he would like to retire from the Township Zoning Board of Appeals. **Motion** to accept John Van Timmeren's letter of resignation was made by Russ Brown and **Supported** by Mark Kidd.

Motion Carried 4-0

First Hearing. Item A: Phillip D. Forner Request

Mr. Phillip D. Forner is requesting a density variance for his property consisting of approximately 35.01 acres commonly known as Brookland Estates Subdivision (parcels number 70-09-23-200-034 and 032) and are located North, East, and South of Allendale Heating Company at 11634 60th Avenue. The property is currently zoned R1A and R1B (low density residential) and AG, (Agricultural and Rural Districts). The total density for the development according to Township calculations, is forty two (42) units whereas the applicant has determined the allowable density to be forty seven (47) units. **The applicant is now requesting a density variance that would allow for seventy (70) single family units.**

A **denial** of the applicant's request, would restrict the developer to forty two (42) units or forty seven (47) units. The permissible number of single family units would depend upon whether the Board agreed with the Township's density calculations by the Zoning Administrator or the applicant's calculations.

Mr. Thomas C. Shearer, Attorney at Law, representing Mr. Phillip Forner spoke in support of the request for a density variance that would allow for seventy (70) single family units. He stipulated that if the density variance for the project was approved, the average lot frontage in the project would be approximately 94 feet and the average lot area would be approximately 14,100 square feet. He further stated that as the project is developed, further variances in front, side, or rear yard setback requirements may be necessary

on some of the lots in the project. These requests would be handled on an individual lot basis.

Some of the reasons given by Mr. Shearer in support of the density variance for the project was economics, irregular size of the parcels, and the loss of some land due to the increased size of the retention pond required for the project by Federal and State regulations.

Several residents present spoke against granting the density variance requested by Mr. Forner for seventy single family units. They included Mr. Harley Sietsema, Mr. Steve LaBrecque, and Mr. Larry Bruins. In addition, a letter from Mr. Gerard Gregels opposing the density variance for seventy single family units requested by Mr. Forner was also received by the Board (refer Exhibit E attached). Some of the reasons given for opposition were; would not be in the best interest of the rest of the community, totally unwarranted, adverse affect on adjacent farming operations, safety, traffic and current infrastructure. However, it should be noted that all of those speaking in opposition of the 70 unit request, did in fact, support the forty two (42) or forty seven (47) unit development of the property as well as permissible under the current zoning of R1A, R1B, and AG.

When Mr. Shearer was asked by the Board if they had any problems complying with the zoning requirements for the portion of the property zoned R1A and R1B, he stated they did not. However, they needed the density variance in order to develop the property into the seventy (70) unit Brookland Estates Subdivision.

This case is a very complex one that has transpired over the past couple years involving the Planning Commission, Township Board, Public Petition for

referendum (special election August, 1995,[)] and now the Zoning Board of Appeals for a density variation.

It should be noted that the Special election in August, 1995 to keep the property zoned agricultural, was held as a result of the property being re-zoned from agricultural use to planned unit development by the Planning Commission and the Township Board. The people in this special election, voted by a substantial majority (75 percent) to keep the property zoned agricultural by a vote of 809 to 269.

After considerable discussion and review of the information presented, a **motion** was made by Russ Brown and **supported** by Ivan Kraker to table and reconvene for further discussions on the issues involved and in a timely manner render a decision on Mr. Forner request for a density variance to permit a seventy (70) single family unity development referred to as Brookland Estates Subdivision.

Motion to Table and reconvene Carried 4-0

Old Business: Amor Sign Studios, Inc.

This hearing was tabled at the October 10, 1996 meeting for design and clarification purposes between Amor Sign and the Zoning Administrator. **Motion** to remove from table and open for discussion was made by Russ Brown and **supported** by Mark Kidd. **Motion to remove from Table carried 4-0**

Mr. Tom Amor, representing Amor Sign and Crystal Flash presented to the board for review a new sign design for the Crystal Flash Facility located at 4617 Lake Michigan Drive in Allendale. Their wish is to replace the current sign located at the East entry Drive. In addition to actual design criteria, Tom Amor also

showed a video showing the approach to the Allendale facility from the East and the West on Lake Michigan Drive and the proposed sign at several different locations in Michigan. The proposed sign as presented, would require a variance for the height of the sign, sign area, moveable parts, color of lighting, and type of sign.

The current sign is non-conforming both in sign area and height and is a pole mounted sign which is not permitted by current ordinance. Refer Article 22.

After review of the information presented by Amor sign and discussion by the Board relative to the intent of Sec. 22.06 and Sec. 22.14 and Table 1 requirements, it was felt that perhaps the Planning Commission should review Article 22 in its entirety to determine if parts of this Article 22 are out dated and need to be revised before the Board acts on Amor's requests for variances on their new proposed sign. **Motion** by Russ Brown and **supported** by Mark Kidd to **Table** this request so that the Planning Commission can review Article 22 in a timely manner, to determine if parts of Article 22 need to be revised. **Motion to Table Carried 4-0**

/s/R. Brown Jr.
Submitted by:
Russell V Brown Jr.
Board Secretary

[Note: Exhibits A (agenda), B (notice of public hearing), C (resignation letter), and D (guest sign-in sheet) have been omitted. Exhibit E (letter from resident) follows.]

EXHIBIT E

To: Board of Appeals
From: Gerard Gregels
Date: 1-6-97
Subject: Request denial to be given for variance at Brookland Estates Subdivision

I would like to express my concern about the density variance requested at Brookland Estates.

With the current approval of either 42 or 47 units, I feel acquiescing to the developers desire to increase to 70 is totally unwarranted. Most importantly, I don't feel it would be in the best interest of the rest of the community.

We currently have a building frenzy going on with new strip malls, apartment buildings, additional subdivisions as well as industrial expansion. If things are not limited or restrained we will have created in this township the over developed and unbridled growth that has occurred in the cities surrounding Allendale- Grand Haven, Holland, Muskegon, and Grand Rapids. Do we really want to become a congested, overcrowded, overdeveloped township?? I don't think the current community wants this to become Allendale's future.

I hope the Board of Appeals will begin now before its too late to exercise restraint when decisions as this come before it.

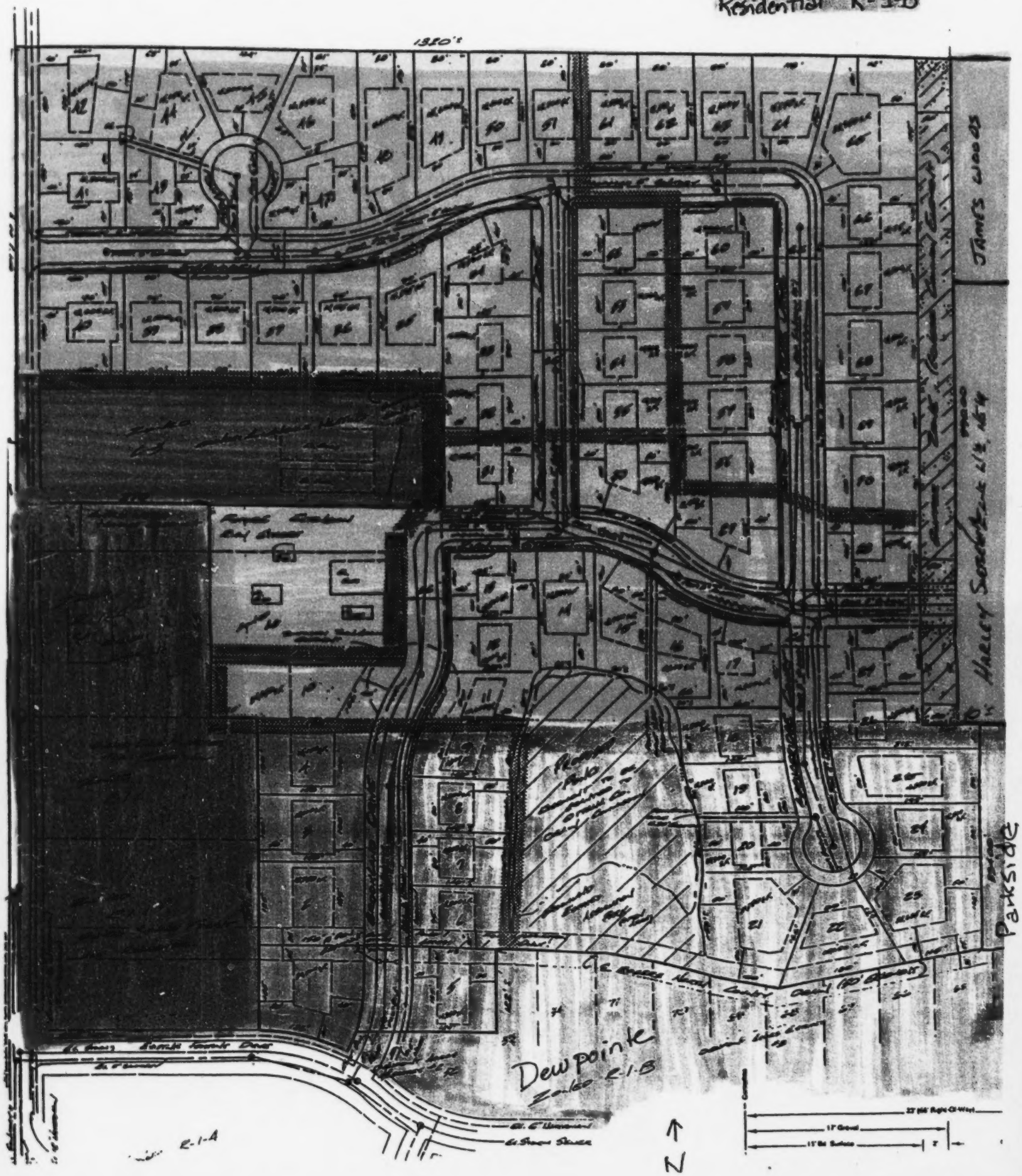
Sincerely,
/s/Gerard Gregels
Gerard Gregels

205a

Map 2 - Zoning in the Area

MAP 2 Zoning in the Area

Commercial C-3
Agricultural AG
Residential R-1-A
Residential R-1-B



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PLAINTIFF'S EXHIBIT

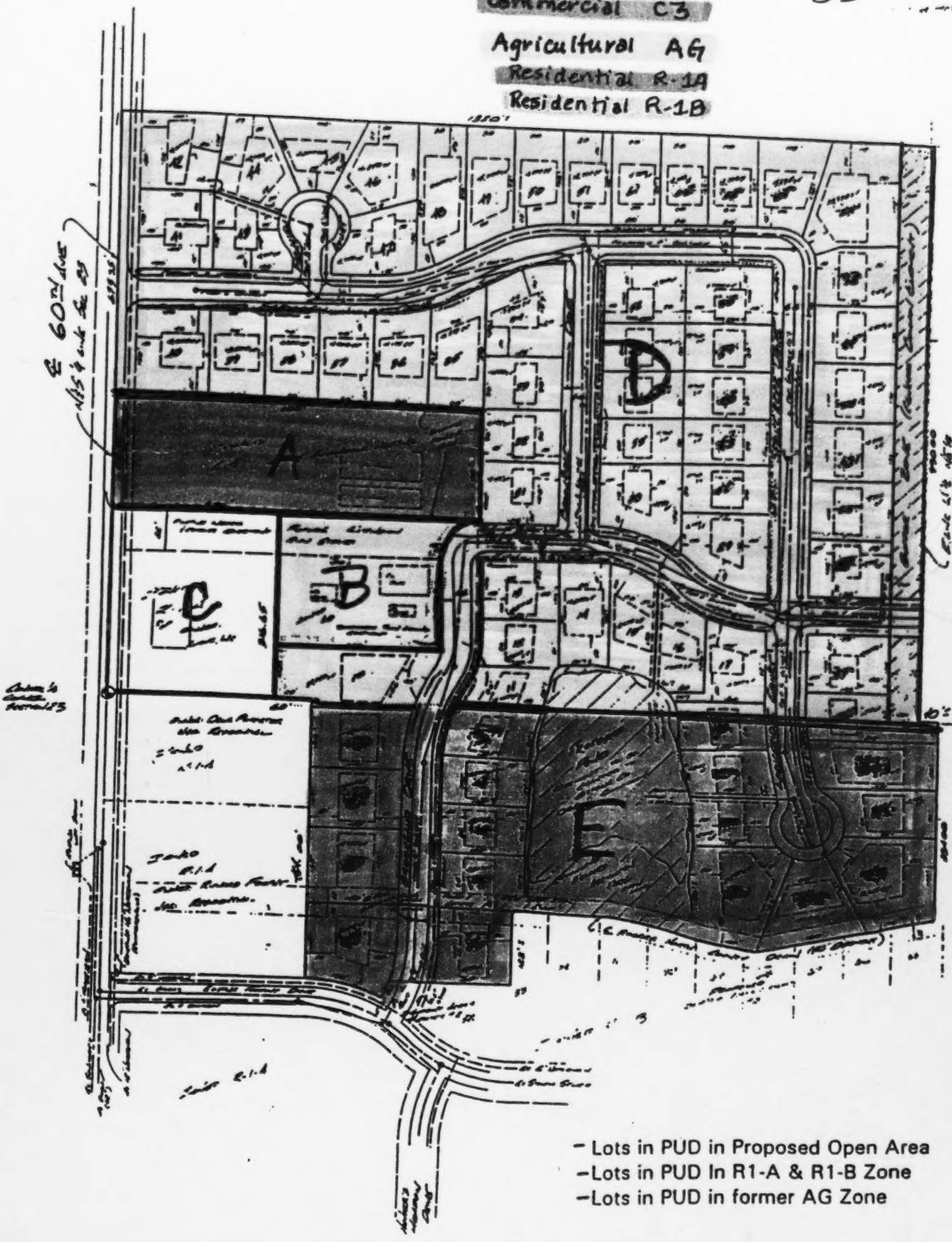
53

Commercial C3

Agricultural AG

Residential R-1A

Residential R-1B



- Lots in PUD in Proposed Open Area
- Lots in PUD In R1-A & R1-B Zone
- Lots in PUD in former AG Zone

MAP 3 Zoning of Plaintiffs Land

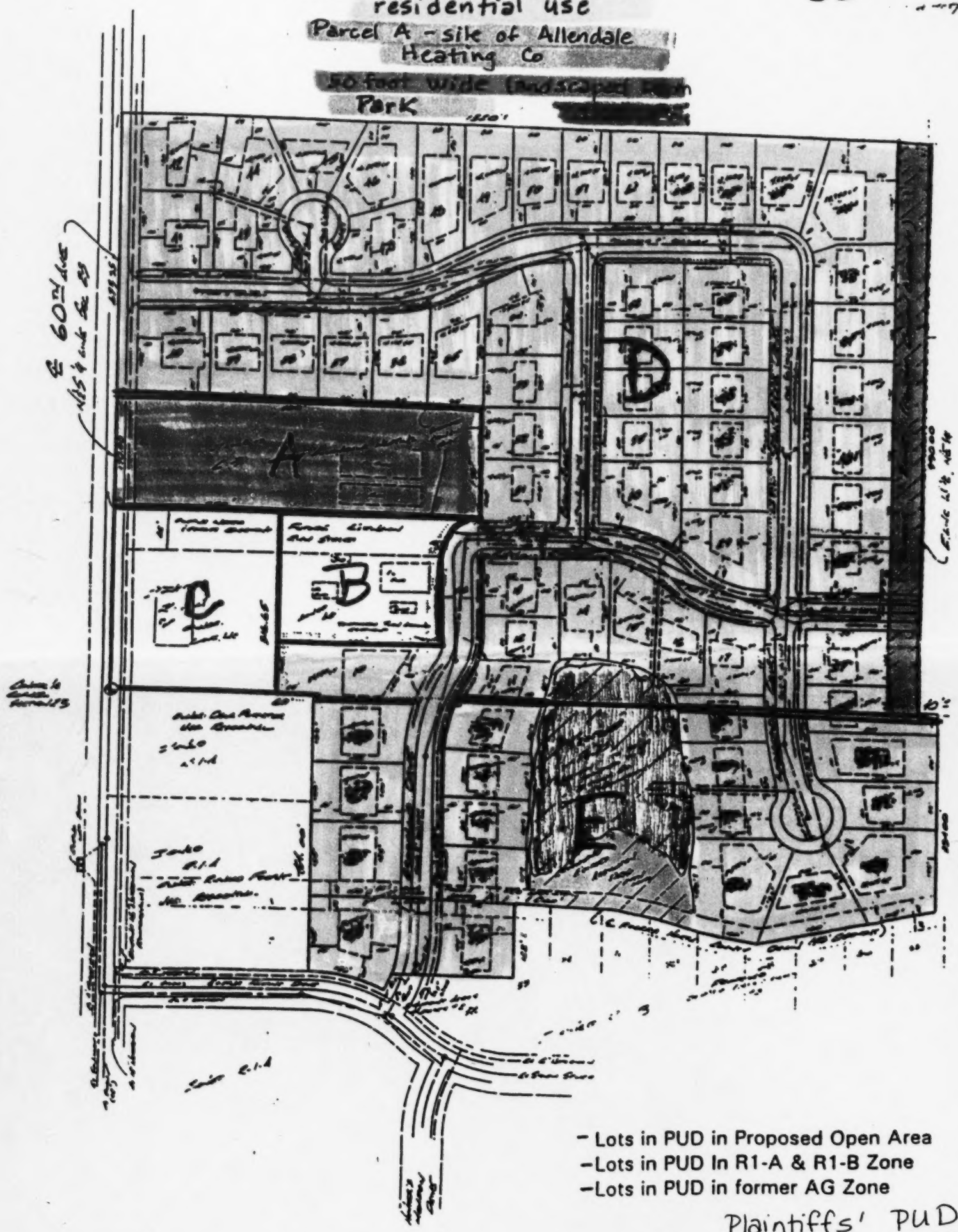
PLAINTIFF'S EXHIBIT
53

Plaintiffs' PUD

70 lots for single family residential use

Parcel A - site of Allendale Heating Co

50 foot Wide [illegible] Park



- Lots in PUD in Proposed Open Area
- Lots in PUD In R1-A & R1-B Zone
- Lots in PUD in former AG Zone

MAP 4

Plaintiffs' PUD
70 lot residential
plus parcel A

Plaintiffs' Land with the ZBA's Variance Imposed

PLAINTIFF'S EXHIBIT

[redacted] 53

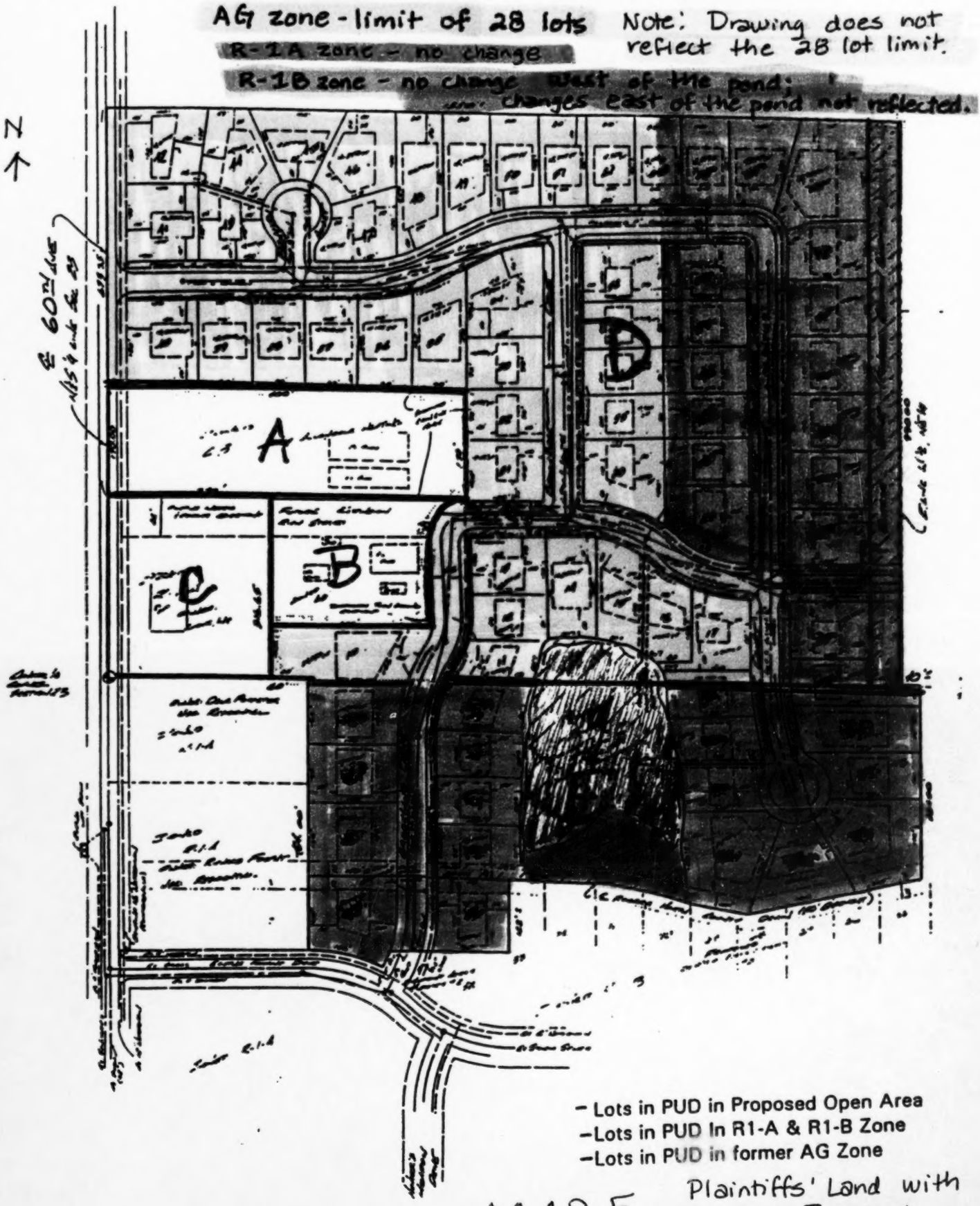
[redacted] 7.65 acre open area [redacted]

AG zone - limit of 28 lots

R-1A zone - no change

R-1B zone - no change west of the pond; changes east of the pond not reflected.

Note: Drawing does not reflect the 28 lot limit.



- Lots in PUD in Proposed Open Area
- Lots in PUD In R1-A & R1-B Zone
- Lots in PUD in former AG Zone

MAP 5 Plaintiffs' Land with Variance Imposed

No. 01-951

Supreme Court, U.S.
FILED
FEB 4 2002
CLERK

In The

Supreme Court of the United States

PHILLIP D. FORNER, F&B DEVELOPMENT, L.L.C., and ALLENDALE HEATING CO., INC., a Michigan corporation,

Petitioners,

v.

ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Did the trial court make erroneous factual findings or misapply properly stated rules of law when it determined that the Township's zoning ordinance did not effectuate an unconstitutional taking of the Plaintiffs' property?

2. Did the trial court make erroneous factual findings or misapply properly stated rules of law when it determined that the Plaintiffs were not denied procedural due process?

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[1] Respondent objects to the Petitioners' "Questions Presented for Review" for the reason that they unfairly incorporate argumentive and erroneous facts contrary to Rule 14 of the Rules of the Supreme Court of the United States.

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ALLENDALE CHARTER TOWNSHIP ZONING ORDINANCE

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STATEMENT OF THE CASE

This is a zoning case in which the Plaintiffs challenge the constitutionality of the Township's agricultural zoning of their 28-acre farm. Specifically, the Plaintiffs would like to develop 52 residential lots on 25.25 acres of this farm, whereas the Township's zoning ordinance, as modified by a variance, would allow them to develop up to 28 lots, a difference of 24 lots.

The Plaintiffs collectively own 37.62 acres of contiguous property in Allendale Township. This property expands over three separate zoned districts identified in the Township's zoning ordinance. The property located north of a quarter section line, consisting of approximately 28 acres, is a farm purchased by the Plaintiff, Phillip Forner, in May 1989 for $128,000. (R II pp. 449-452; R III p. 558). (References are to the trial transcript).[2]

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[2]

R I = 02-12-97 Trial's First Day, pp 2-254
R II = 02-13-97 Trial's Second Day, pp 254-503
R III = 02-14-97 Trial's Third Day, pp 503-782
R IV = 02-25-97 Trial's Fourth Day, pp 1-174
R V = 02-26-97 Trial's Fifth Day, pp 175-248,
R V-A = 02-26-97 Excerpt containing Boelkin's testimony that follows p 234 of R V and that is separately paginated 2-86
R V-B = 02-26-97 Excerpt containing Brummel's testimony that follows p 424 of R V and that is separately paginated 1-25
R VI = 03-07-97 Trial's Sixth Day, pp 2-285

Located on this farm property are two residential houses, a large pole barn, a veal calf barn, other structures and a parcel donated to Love, Inc. (R III pp. 562-565). This area is identified as "B" and "C" on the map attached to the trial court's Opinion. (Pet., App. at 44a). The remainder of this farm (marked as parcel "D" on this map) is approximately 25.25 acres. (Pet., App. at 44a). The only property involved in this litigation is this 25.25-acre portion of this farm.[3]

This entire farm property has long been zoned in the "AG Agricultural and Rural District" (AG) under the Township's zoning ordinance. Likewise, all of the properties surrounding the Plaintiffs' farm on the west, north and east sides are zoned within, and are being used in compliance with, the AG District.[4]

Immediately adjacent and contiguous to the east bounty line of the Plaintiffs' farm is a large, intensive and active turkey farm which processes approximately 200,000 turkeys a year. (R III pp. 707-708). In addition to several large structures (including "brooder" barns, a

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[3] The Plaintiffs did not need, request or obtain any variance relief from the Zoning Ordinance provisions applicable to their adjacent property located in the C-3 Commercial District or their property located in the R-1 Residential District. Further, the Plaintiffs do not assert any "as applied" constitutional challenges to the Township's zoning of their C-3 or R-1 zoned property. Consequently, the Township's zoning of this adjacent property is not at issue or being contested in this case.

[4] The quarter section line that runs along the south boundary of the Plaintiffs' farm has historically separated the AG zoned property on the north from the R-1 residential zoned property to the south in this section of the Township.

manure recycling building, large grain bins, and large noisy grain dryers), this turkey farm utilizes several large pieces of equipment, including transportation vehicles, semi-tractors, bulldozers, and farm equipment. (R III pp. 702-713). In addition, the fields on this farm, which run right up to the Plaintiffs' east boundary line, are used to plant, grow and harvest crops, as well as for the spreading of large quantities of turkey manure. Various chemicals are also sprayed on these fields by sprayers and airplanes. (R III pp. 724, 732-733). To protect the turkeys, the owner has implemented a "strict bio-security system," which precludes anyone (including employees) from entering the turkey barns (or going from one barn to the other) without first taking a shower, changing clothes, and using iodine disinfectant to wash their shoes. Further, the employees are not permitted to own any pets such as dogs, parakeets, or parrots. If a neighbor boy, for example, out of curiosity were to enter one of the barns without complying with this bio-security system, it could be "disastrous," with the loss of approximately $125,000 worth of turkeys in just one barn. (R III pp. 714-715, 771). As determined by the trial judge, based upon the evidence submitted during the trial, a residential development at the threshold of this farm would be incompatible with this high intensity agricultural land use, resulting in many serious conflicts and problems. (Pet., App. at 37a-38a).

The Township's zoning ordinance permits several uses as a matter of right within an AG District. These permitted uses include various general and specialized farming and agricultural activities. (Pet., App. at

133a-134a). In addition, single family residences are permitted in an AG District as long as the lot area is not less than one acre and the width of the lot at the front building line is not less than 150 feet. (Pet., App. at 134a, 136a).

After deducting the area that would be required for roads, the Plaintiffs could develop this 25.25-acre section of their farm into 20 lots under the zoning ordinance restrictions. (R IV p. 153; R V-B pp. 19-20). The Plaintiffs, however, wanted to increase the number and density of the houses on their AG property by building more and smaller lots than permitted in an AG District. Therefore, during the pendency of this litigation, they filed an application with the Township Zoning Board of Appeals (ZBA) for variances from the applicable area, frontage and density requirements.[5]

In response, the ZBA substantially (but not completely) granted the Plaintiffs' variance application at the conclusion of the public hearing on February 3, 1997. The granted variances include:

1. Reducing the minimum lot area from 1-acre to 10,000 square feet (12,500 square feet for corner lots).

2. Reducing the minimum lot frontage width from 150 feet to 80 feet (100 feet for corner lots).

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[5] The Plaintiffs were also required to apply for such variances before their constitutional claims would be ripe for adjudication. *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 at 2459 (2001); *Paragon Properties v. Novi*, 452 Mich. 568 (1996).

3. Increasing the maximum number of permitted dwellings on the Plaintiffs' AG property from 20 to 28.

These variances were made subject to **only** the following conditions:

1. The maintenance of a defined buffer space on the east side of the property to help separate their residential development from the adjacent conflicting intensive agricultural land use.

2. The construction and maintenance of an earthen berm four feet in height along the eastern boundary line to help separate their residential development from the adjacent conflicting intensive agricultural land use.

3. The inclusion of a disclosure statement in the deeds conveying the lots in the development.

4. Instead of being made permanent, the above conditions contained, for the benefits of the Plaintiffs, a sunset provision which provided for their elimination when the conflicting land use on the east side of the property ceased to exist for a period of one year – similar to the one year limitation provision in Section 26.03 of the Zoning Ordinance for the discontinuance of a non-conforming use. (Pet., App. at 57a-60a).

In short, the variance permitted the Plaintiffs to build smaller lots, and increase the number of permitted lots from 20 to 28, in exchange for complying with certain mitigating conditions, including the maintenance of a buffer zone to help reduce the resulting conflicts that

would otherwise occur between these incompatible land uses.[6]

This variance simply gave the Plaintiffs some additional flexibility and options in the use of their property. If they chose, the Plaintiffs could still use or develop the property as zoned without using the benefit of the conditional variance. Therefore, the variance did not take any prior rights or uses away from them.

At the conclusion of an extensive trial, the trial court made certain factual findings and concluded that the Township's zoning ordinance, as applied to the Plaintiffs' property, is constitutional in that it advances legitimate governmental interests, is reasonable, and does not effectuate any unlawful taking. (Pet., App. at 33a). In addition, the trial court on appeal affirmed the ZBA variance decision upon determining that it complied with the constitution and laws of the state, was based upon proper procedure, was supported by competent, material, and substantial evidence, and represented the reasonable exercise of discretion granted by law to a ZBA. (Pet., App. at 45a). These determinations were all affirmed by the Michigan Court of Appeals in its May 26, 2000 Opinion. (Pet., App. at 1a). The Michigan Supreme Court denied Application for Leave to Appeal, as it was "not

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[6] Even the Plaintiffs' land use expert, Dennis Larkin, admitted that reducing the area and width requirements of lots in exchange for providing an open space, to separate the development from an adjacent land use ("cluster zoning"), is an acceptable land use practice, especially when one can thereby develop at least the same number of lots on the property as would have been permitted under the existing zoning restrictions. (R II pp. 315-316).

persuaded that the questions presented should be reviewed by this Court." (Pet., App. at 79a). The Michigan Supreme Court then denied the Petitioners' Motion for Reconsideration on July 30, 2001. (Pet., App. at 77a).

REASONS FOR DENYING THE WRIT

The Plaintiffs' Petition for Writ of Certiorari challenges the factual findings made by the trial court and/or the trial court's application of properly stated rules of law to those factual findings. As such, any decision by this Court would be limited to the peculiar facts of this case with little, if any, application to any other cases. This Court, however, has long held that "it does not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), and that its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). Also see *Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) and Rule 10(c) of the Rules of the Supreme Court of the United States.

Even if it were the function of this Court's certiorari jurisdiction to correct such factual findings by the trial court, there would be no reason for review in this case because those issues were correctly decided by the trial court, as discussed below.

I. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE TOWNSHIP'S ZONING ORDINANCE DID NOT EFFECTUATE AN UNCONSTITUTIONAL TAKING OF THE PLAINTIFFS' PROPERTY

A. The Agricultural Zoning of the Plaintiffs' Farm

In support of their "taking" claim, the Plaintiffs in their Petition first suggest that there is no legitimate governmental interest behind the residential development restrictions contained in the Township's agricultural zoning of their farm land. Although they recognize that there is a legitimate governmental interest in separating incompatible land uses, they base their entire argument on their claim that there is no incompatibility between intensive agricultural operations, like a turkey farm, and a single-family residential development. (Pet. at 27). The trial court, however, rejected this factual argument by noting that the evidence "very convincingly" points out the incompatibility between these conflicting land uses, and the serious problems that these incompatible land uses would create if adjacent to each other. (Pet., App. at 37a-38a).

This factual determination by the trial court was supported by, among others, Dr. David Skjaerlund who serves as the Executive Director for the Rural Development Council of Michigan, and is an expert who counsels communities on how to address the conflicts that arise between adjacent residential and agricultural land uses. (R IV p. 56). He testified about the enormous incompatibilities and conflicts that would occur between these two adjacent land uses, with each land use having a

negative impact on the other. (R IV pp. 63-71). This incompatibility between adjacent residential and agricultural land uses, and the existence of the governmental interest in addressing those issues, has even been recognized by the Michigan legislature in its adoption of the Michigan Right to Farm Act, MCL 628.471 et seq.

Further, expert testimony at trial confirmed that the restrictions contained in the Township's zoning of the Plaintiffs' property (with and/or without the variance) did indeed help to reduce these conflicts, and thereby served to advance this legitimate governmental interest. See, for example, the expert testimony of Dr. Skjaerlund (R IV p. 72) and the testimony of the professional community land use planner, Paul LeBlanc (R IV pp. 152-155), who testified that the zoning ordinance restrictions, as applied to the Plaintiffs' property, were reasonable in advancing this legitimate governmental interest. Obviously, the fewer number of homes there are next to a turkey farm or other agricultural land use, and/or the greater the buffer space between them, the fewer number of problems, conflicts and complaints will likely occur.

In their Petition, the Plaintiffs also try to make the factual argument that the agricultural zoning of their property constitutes a taking for the reason that it "deprives them of any economically beneficial use of that land." (Pet. at 25). However, the evidence presented during the trial, and the findings of fact made by the trial court, established just the opposite by confirming that their property has substantial value, and can be used for many purposes, under its existing zoning.

First, based on the evidence presented during the trial, the trial court specifically found as a finding of fact that the Plaintiffs' property has "considerable value as farm land," which the court determined to be in the amount of $90,000.[7] (Pet., App. at 39a). This amount did not even include that part of the farm donated to Love, Inc. valued at $20,000, or the parcel on which the two houses and other structures were located, valued at $20,000 exclusive of the value of the structures thereon. If one were to add those values to the $90,000, the total value of the Plaintiffs' AG property would be at least $130,000, which exceeds the Plaintiffs' $128,000 purchase price for the farm.

Second, the trial court found that the Plaintiffs' property has "considerable value" in the amount of $200,000 for rural residential purposes.[8] (Pet., App. at 39a). This $200,000 value also only pertained to the 25.25-acre section of the farm. If one were to add the value of the balance of the farm ($40,000, exclusive of the value of the structures thereon) as noted above, then the total value of

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[7] This conclusion was based in part on the expert testimony of Stan Boekins, a certified real estate appraiser. (R V-A pp. 5-9). It is also supported by the expert testimony of Dr. James Crum, from Michigan State University, who testified that the property is suitable and can be used for a wide variety of agricultural purposes. (R III pp. 630-634, 644). (Pet., App at 39a).

[8] This conclusion was also supported by the expert testimony of Stan Boekins. (R V-A pp. 9-16). It is also supported by the testimony of Tom Olson, of the County Health Dept., who testified that this property would be suitable for on-site private septic systems. (R III pp. 657-662).

the Plaintiffs' farm would be at least $240,000, which would exceed its purchase price of $128,000 by $112,000.

To use their property for such agricultural and/or rural residential uses, the Plaintiffs would not have to incur any infrastructure expenses for building any roads or installing any public water or sewer lines. Consequently, their argument that they "invested $112,032 in infrastructure work and legal fees to create the site condominium" (Pet. at 28) is simply not applicable.[9]

The above agricultural and rural residential uses, and their resulting $90,000 and $200,000 values respectively, are available to the Plaintiffs under the Township's zoning ordinance even without the benefit of the optional variance that was granted to them by the ZBA. Consequently, given these factual determinations made by the trial court, the Township's zoning ordinance, even without the benefit of the ZBA variances, does not effectuate any unconstitutional taking of the Plaintiffs' property.

The Plaintiffs do, however, have the additional alternative of being able to develop their AG property in accordance with the variances granted by the ZBA. With the benefit of these variances, the Plaintiffs could build up to 28 lots on the 25.25-acre section of this property. Although there may be countless ways in which the Plaintiffs could design such a development, the Township Zoning Administrator, Phillip Brummel, produced during

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[9] In addition, most, if not all, of those expenses were for work done for, and needed by, the Plaintiffs' residential development on their adjacent R-1 property as opposed to their AG property, i.e., the roads and the public water and sewer lines therein.

the trial two separate site plans showing how this could be done in conformity with the Township's zoning ordinance as modified by the ZBA variances. (R VI pp. 19-23). Using the same lot values and development cost figures introduced into evidence by the Plaintiffs' own expert (Def. Exh. 50, R VI pp. 2, 2-3), Plaintiffs could make a net profit of $361,616 under one of those site plans and $390,041 under the other.[10] (R VI pp. 264-266). Consequently, the ZBA variance further serves to completely destroy their taking claim.

With or without the ZBA variances, the Plaintiffs' property can be used, and has substantial value, under the Township's zoning ordinance. Consequently, their "taking" claim is completely without merit as having no factual or legal basis.

B. The Buffer Space Condition to the Variance

This is a meaningless issue. It is meaningless because, as noted above, the AG zoning of the Plaintiffs' property does not effectuate any unconstitutional taking, even without the benefit of the conditional variances granted by the ZBA.

In addition to the uses available under the AG zoning, the ZBA granted the Plaintiffs the benefit of an additional option in the form of a conditional variance. In

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[10] The Plaintiffs' argument to the contrary is factually flawed and contrary to the record, including their own expert's figures, partly because they try to include unnecessary development expenses for improvements not required under the zoning ordinance.

exchange for permitting a reduction in the minimum area and width of the lots, and permitting eight more lots than otherwise would have been permitted under the zoning ordinance, the variance required a buffer space to help separate the Plaintiffs' proposed high-density residential development from the adjacent incompatible land use, being the turkey farm. As part of their litigation strategy, the Plaintiffs attempted to attack the validity of this buffer space condition in order to totally eliminate the benefit of this variance option.[11]

This was for the purpose of trying to reduce the economically beneficial use of their property, and thereby enhance their constitutional attack on the Township's zoning of their property. However, this trial strategy failed because, as noted above, the AG zoning of their property is constitutional even without the benefit of this variance. Consequently, this issue has been rendered moot and completely meaningless.

Additionally, the Plaintiffs are simply wrong in arguing that the buffer space condition amounts to an unconstitutional taking. First, the Plaintiffs continue to make the erroneous factual argument that they have no economically beneficial use of this buffer space. Instead, it would have substantial economic value to the Plaintiffs. Under the ZBA variance, they are merely precluded from constructing a structure or road in it. They could use this buffer space for any other purpose permitted under the

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[11] As the buffer space was a condition to, and in exchange for, the benefit of being able to build smaller and 8 more lots, those benefits under the variance would also be eliminated if the buffer space condition were to be eliminated.

zoning ordinance, including using it as a park, recreation area, or otherwise to enhance the quality and value of their residential development and lots therein. In fact, the very existence of an open space in and of itself enhances the value of a residential development. Alternatively, the property within the buffer space could be used to be included within, and thereby increase the size of, one or more of the adjacent lots, which would increase the value of those resulting larger lots within their development. Further, the ZBA included a sunset provision on this buffer space requirement, instead of making it a permanent condition as is customary. Therefore, the Plaintiffs will be able to develop this buffer space when the incompatibility caused by the adjacent turkey farm operation ceases to exist. This also greatly adds to its economic value. Consequently, the trial court properly rejected this attempted factual argument by the Plaintiffs. (Pet., App. at 36a-37a).

Second, the Plaintiffs make the erroneous factual argument that this buffer space does not satisfy the "rough proportionality" test set forth in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). After considering all of the evidence produced at the trial, the trial court rejected that factual argument and found that the size and configuration of this buffer space was "reasonable." (Pet., App. at 38a).

Third, in *City of Monterey v. Delmonte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-703, 733 (1999), this Court confirmed that the "rough proportionality" test in *Dolan* does not even apply to regulations which simply regulate the scope of development on one's property, i.e., the denial of development. It only applies to those limited situations in which the condition requires the actual

"dedication of property to public use," which is not the case here. Also see *Bevan v. Brandon Township*, 438 Mich. 385, 398 n.12 (1991).

Fourth, the Plaintiffs' argument that the buffer space condition amounts to unconstitutional nuisance abatement is both factually and legally wrong. As explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), consideration of a state's nuisance law only comes into play to legitimize a zoning ordinance when it has the effect of prohibiting *all* economically beneficial uses of the Plaintiffs' contiguous land, i.e., a "total taking." This nuisance law concept, however, simply has no application to a situation, such as the present case, where a zoning ordinance does not effectuate a "total taking" of the Plaintiffs' contiguous property. In fact, the *Lucas* court rejected the concept of analyzing the validity of zoning restrictions by looking at any harmful or obnoxious use of the regulated property. Instead, the proper analysis is to simply determine whether the regulation advances a legitimate governmental interest. *Lucas*, at 1022-1024. In restricting the use of property it is not necessary to declare that use to be a nuisance. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). It is sufficient to merely determine that the restricted use is simply the "right thing in the wrong place," i.e., "like a pig in the parlor instead of the barnyard." *Euclid*, at 388.

Further, Plaintiffs conveniently overlook the fact that the buffer space will also help to abate the various nuisances and negative impacts their proposed development would have on the people who reside therein and on the adjacent land use, and not just the impact the turkey farm would have on their subsequent development. As Paul

LeBlanc, the expert community use planner, testified, the structures in the development themselves may not be a nuisance, but people who live in them cause various problems to occur for which zoning laws are designed to address. (R V pp. 183-184). This is why open spaces, buffers, and set backs are customarily required. Indeed, the use of such open spaces has long been recognized as a valid and legitimate zoning tool to help separate adjacent land uses. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

Fifth, the Plaintiffs' "taking" argument in reference to this buffer space is fatally flawed from the get-go. In making their argument, they cut out, extract and analyze only that part of the property located within this buffer space without regard to the balance of their contiguous property. That approach violates one of the fundamental principles of taking jurisprudence known as the "non-segmentation" principle. Under this rule of law, all of the Plaintiffs' contiguous property is to be considered as a whole when deciding whether a regulatory taking has occurred. The court cannot divide contiguous property into discrete segments and then analyze whether there has been a regulatory taking in reference to each segment. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-131 (1978); and *K&K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 578-539 (1998). If this were not the case, then all open spaces, buffers and set backs customarily used throughout the nation to help separate adjacent land uses would be put into jeopardy. This court, however, has long recognized such open spaces to be lawful and valid tools used in the administration of zoning ordinances. *Agins v. City of Tiburon, supra.*

II. THE TRIAL COURT DID NOT MAKE ANY ERRONEOUS FACTUAL FINDINGS OR MISAPPLY PROPERLY STATED RULES OF LAW WHEN IT DETERMINED THAT THE PLAINTIFFS WERE NOT DENIED PROCEDURAL DUE PROCESS.

This is also a meaningless issue. In addition, the Plaintiffs base their procedural due process argument upon their erroneous characterization of the facts.

This is a meaningless issue in this case because of the way the Plaintiffs have postured this case and formed their requested relief. In their appeal of the ZBA variance decision to the trial court,[12] the Plaintiffs did not complain that the ZBA denied their request for a variance (which it only partially granted), or even complain that the ZBA should have given them more relief than it did. Instead, their unique "complaint" in this case was that the ZBA granted them some relief. Instead of asking the trial court to give them more relief, the Plaintiffs in this case attempted to have the court declare the entire variance null and void, and thereby eliminate the benefit of their variance option in total.

In addition to the multitude of permitted agricultural and other uses, the zoning ordinance permits the Plaintiffs to develop their property up to 20 one-acre lots with

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[12] One may appeal a final decision by a ZBA to the Circuit Court as a matter of right under MCL 125.293a to insure that the decision (a) complies with the constitution and laws of the state, (b) is based upon proper procedure, (c) is supported by competent, material, and substantial evidence, and (d) represents the reasonable exercise of discretion granted by law to the ZBA.

150-foot frontages. In responding to the Plaintiffs' variance application, the ZBA did not take any of these permitted uses or rights away from the Plaintiffs – NONE. Instead, by giving the Plaintiffs certain area, frontage and density variances, the ZBA only served to increase their options in developing this property up to 28 lots. The Plaintiffs recognized that this variance relief, which substantially increased their economically beneficial use of their property, greatly jeopardized their "as applied" constitutional attack on the zoning ordinance. So as trial strategy, they attempted to eliminate and destroy these variances in order to enhance their "as applied" constitutional attack on the zoning ordinance. If they had been successful, they were then hoping to be able to convince the trial court to take the next giant step of permitting them to continue with their original proposed higher density development without regard to the adjacent, incompatible and conflicting land use. This attempt at self creating their own hardship, in order to have a better shot at achieving their desired trial results, proved to be a futile effort because, given the determinations by the trial court as noted above, the zoning of the Plaintiffs' property is constitutional even without the benefit of the ZBA variances. As the zoning ordinance is constitutional with *or* without the benefit of this variance, this procedural due process issue has been rendered moot and completely meaningless in this case.[13]

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[13] The Plaintiffs are not required to use this variance relief. The option to use it or not is theirs. No court has to declare it void in order for them to elect not to use it.

Further, procedural due process is a "flexible concept" that varies depending on the nature of the proceedings and the interest affected. Generally, due process requires that the parties receive notice of the proceedings, an opportunity to be heard, and an impartial decision maker. The opportunity to be heard does not require a "full trial like proceeding". *Convalescent Center v. Blue Cross*, 414 Mich. 247, 270-271 (1982). Also see *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001). Again, in this case, the Plaintiffs' unique "complaint" is that the ZBA granted them some beneficial relief, as to opposed to complaining that the ZBA should have given them more relief. In rendering their decision, the ZBA did not take any prior rights or benefits from the Plaintiffs, who could still choose to develop the property as zoned without the benefit of the variance. In other words, the "interest affected," as identified by the Plaintiffs, was in the form of having received a benefit as opposed to losing any prior rights. Consequently, if the Plaintiffs have *any* procedural due process rights here, then the applicable standards of this flexible concept under the Plaintiffs' unique posture in this case would be at best extremely minimal.

In any event, procedural due process standards were satisfied in this case. The Plaintiffs' arguments to the contrary are based upon their erroneous characterization of the facts. They were indeed given a full opportunity to be heard, and were not denied the right to cross-examine anyone, before the ZBA rendered its decision on the variances.

The Plaintiffs were first given the opportunity to be heard by being entitled to provide any information they wanted along with their variance application. (Record

Exhs. 1 & 2).[14] Then, in addition to receiving notice of the proceedings, they were indeed present with legal counsel at each of the two public hearings held on their application. At the first hearing on January 9, 1997, the Plaintiffs and their attorney took full advantage of their opportunity to be heard by presenting all of their facts and arguments in support of their application. (Pet., App. at 200a-201a).

It must be remembered that by the time of this hearing, the Plaintiffs had been through a rezoning process with the Planning Commission and the Township Board, then through a highly contested referendum, and had been involved in this litigation for approximately one and a half years. Consequently, by the time of this hearing, they were well aware of all of the arguments raised in opposition to their application, including the number of lots and the size of the buffer space. Those arguments were again voiced at this first hearing by residents who spoke in opposition to the variance application. (Pet., App. 201a). Therefore, the Plaintiffs were fully aware of all those issues and had the full opportunity to respond to them.

At the end of the January 9, 1997, hearing, the ZBA voted to "table" and "reconvene" the hearing so that the Township's Zoning Administrator would have the opportunity to submit into the evidentiary record a written

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[14] "Record Exh" are references to the exhibits that constituted to record of the ZBA submitted to the trial court for their appeal of the ZBA decision, and are identified with the corresponding exhibit numbers in the "Stipulation to the Record of the Zoning Board of Appeal" filed with the trial court.

report for the ZBA to consider before rendering a decision. (Pet., App. at 49a, 52a, 53a, 74a & 202a). This was done with the full knowledge of the Plaintiffs in their presence without any objections being voiced by them. (Pet., App. at 198a-202a).

As requested by the ZBA, the Township Zoning Administrator, Phillip Brummel, prepared a "Staff Report and Recommendations" dated January 31, 1997, and distributed it to the ZBA members that day. (Pet., App. at 49a). Before commencing with the continued hearing on February 3, 1997, everyone present at the meeting, including the Plaintiffs and their attorney, were first given a copy of the Staff Report.[15] [16] (Pet., App. at 49a). Phillip Brummel then presented his Staff Report and responded to several questions from the Board. Again, this was all done without any objections from the Plaintiffs. The Plaintiffs' assertion that their counsel "tried to object" (Pet. at 11) to the presentation of Staff Report is a disputed issue of fact and not supported by the record

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[15] Although the Plaintiffs were fully aware that the Staff Report was going to be presented at this hearing, they chose not to request or obtain a copy of it in advance of the hearing. In any event, they did receive a copy of it at the beginning of this hearing when it was submitted to the Board for consideration.

[16] Although the record does not specifically identify when that part of the public hearing ("tabled" on Jan. 9, 1997, to be "continued" and "reconvene" on Feb. 3, 1997 [Pet., App. at 49a & 202a]), for the collection of evidence was closed, it would have necessarily been some time after the submission of the Staff Report and just before the motion was made to adopt the Resolution, as it was always the clear intent and understanding that the Staff Report would be received into the evidentiary record for consideration by the ZBA.

below. (Pet., App. at 51a). In addition, and more importantly, the Plaintiffs never did request any opportunity to ask Mr. Brummel any questions, to cross-examine him, or to in any other way respond to his presentation.[17] (Pet., App. at 51a).

A motion was then made to approve a proposed resolution in reference to their variance decision. This motion passed by unanimous vote. Again, this was all done without any objections or concerns being expressed by the Plaintiffs who were present with legal counsel. (Pet., App. at 50a). It was only *after* this resolution had already been adopted that the Plaintiffs requested permission to make a statement. This request was simply to "make a statement relative to the Board's action." (Pet., App. at 50a). It was not a request for an opportunity to ask the Zoning Administrator any questions, to cross-examine him, or in any other way respond to his Staff Report.

As the decision had already been rendered, the chairman advised them to put any statement they may have in writing and send it to the Board. (Pet., App. at 50a). In spite of this invitation, the Plaintiffs never took advantage of that additional opportunity to be heard.

Further, the Plaintiffs failed to take advantage of the opportunity provided to them under Section 28.06 of the Township Zoning Ordinance (Pet., App. at 187a) to file a

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[17] As the Plaintiffs were the applicants and not just members of the general public, the ZBA would have given them this opportunity. Further, the Plaintiffs have never identified what they would have offered, if anything. Therefore, they cannot demonstrate any harmful or reversible error.

request for reconsideration of the Board's decision. (See Stipulation to the Record of the Zoning Board of Appeals.) This right to file a request for reconsideration included the right to submit any additional evidence for the Board to consider in rendering its final decision. As recognized by the trial court, the Plaintiffs simply, knowingly and voluntarily elected to waive and relinquish this further opportunity to be heard. By not taking advantage of this right to request reconsideration, the Plaintiffs are precluded from claiming that they have been prejudiced by any alleged wrongful failure to give them such an opportunity. *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). Also see *Brody v. City of Mason, supra* at 438.

A party may not attempt to "build error" into a proceeding by idly sitting by in the face of actual or perceived irregularities, hoping for a favorable decision, then urge those un-objected-to irregularities as a basis of review if the decision goes against them. *Sampeer v. Boschma*, 369 Mich. 261, 265-266; 119 NW2d 607 (1963). Such attempts to manufacture error have repeatedly been held not to preserve the error but to waive it. *Id.* Plaintiffs, by failing to object in any way to the procedures afforded them by the ZBA prior to its decision, have likewise waived any right to complain about those procedures on appeal.

Petitioners acknowledge that Michigan law recognizes the right to cross-examine witnesses during ZBA hearings. (Pet. at 15-16). The existence of that right or legal principle is not at issue in this case. Instead, the Plaintiffs simply assert that this legal principle was not applied to the unique facts involved in this case, which is

factually disputed by the parties. In any event, this issue has been rendered moot and meaningless in light of the trial court's factual findings supporting the conclusion that the zoning ordinance as applied to the Plaintiffs' property is constitutional even without the benefit of this variance granted by the ZBA. Its validity therefore has no bearing on the results in this case. Again, the Plaintiffs are free to use or not use the variance as they choose. Consequently, even if this court were inclined to consider and further define minimum procedural due process standards applicable to a variance hearing before a township zoning board of appeals, this case would serve as an extremely poor vehicle to bring those issues before this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectively requests that the Petition for Writ of Certiorari be denied.

Dated: February 1, 2002

Respectfully submitted,

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